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## Articles

# Inheritance and Bankruptcy: The Meaning of the “Fresh Start”

by  
ADAM J. HIRSCH\*

### I. Introduction

When an insolvent individual debtor enters bankruptcy liquidation, she surrenders her remaining assets in exchange for a discharge, wiping out the unpaid balance of her debts. The moment the debtor files a petition for relief,<sup>1</sup> the court draws a hypothetical “line of cleavage” between her pre- and postpetition assets and obligations. Any nonexempt property owned and income earned up to the moment of the petition flows into the bankruptcy estate for distribution to prepetition creditors.<sup>2</sup> Income earned and property accumulated thereafter is hers to keep, subject only to the claims of subsequent, postpetition creditors.<sup>3</sup> The discharged debtor thus enjoys the privilege of a “fresh start,” an opportunity, so to say, for financial rebirth.<sup>4</sup> Leaving behind

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1. 11 U.S.C. § 301 (1988).

2. 11 U.S.C. § 541(a)(1) (1988).

3. 11 U.S.C. § 727(b) (1988).

4. See, e.g., *In re Bruno*, 68 B.R. 101, 103-05 (Bankr. W.D. Mo. 1986) (drawing this analogy). The analogy is an old one. See, e.g., DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 180 (1980) (quoting James Bayard’s statement in 1797 that bankrupts received an opportunity “to begin the world anew”). Indeed, this suggestion was not merely analogical, as some early English bankrupts were sentenced to the gallows. See *infra* note 165.

her prior assets but also her outstanding liabilities, the debtor emerges from bankruptcy liquidation in a restored state of nascent solvency.

All of this is elemental and elementary—the basic substance and process of consumer bankruptcy. But let us now vary the hypothetical just slightly. Suppose instead of beginning to earn income incrementally upon receipt of her discharge, a debtor were thereafter to succeed to property spontaneously under her parent's will. By no coincidence at all, a debtor might today declare bankruptcy and tomorrow inherit a fortune. Should she keep her inheritance under the theory of the fresh start, or should it flow back into the bankruptcy estate to satisfy her prepetition creditors? In other words, should *gratuitous transfers* be treated like *income* under the Bankruptcy Code, or should these two means of property acquisition be structurally differentiated?

The legal rules that apply to this problem are (more or less) cut and dried. Under the Bankruptcy Act of 1898 (the Bankruptcy Act) as originally enacted, gratuitous transfers split along the same strict line of cleavage that applied to income.<sup>5</sup> If the debtor inherited the day before filing her petition (irrespective of the actual date of distribution),<sup>6</sup> her legacy went to her creditors; if the day after, it was hers

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5. Prior American bankruptcy acts had handled the problem in various ways. Under the original Bankruptcy Act of 1800, inheritances received by a debtor after she was declared bankrupt, but *before* she obtained a certificate of discharge, went to her creditors. Bankruptcy Act of 1800, *reprinted in* 10 COLLIER ON BANKRUPTCY app. § 50, at 1734 (James M. Moore & Lawrence P. King eds., 14th ed. 1978). The Bankruptcy Acts of 1841 and 1867 failed to distinguish inheritances from income, but the Act of 1841 set the date of cleavage for *all* property at the adjudication of the debtor as a bankrupt, rather than at the moment of the petition. Bankruptcy Act of 1841, *reprinted in* 10 COLLIER, *supra*, app. § 3, at 1739. Inheritances received during the interval fell into the bankruptcy estate. *Ex parte Newhall*, 18 F. Cas. 74 (C.C.D. Mass. 1842) (No. 10,159) (Story, J.). By contrast, the Act of 1867, like all subsequent acts, set the line of cleavage at the moment of the petition. Because the Act of 1867 also failed to distinguish inheritances from income, its treatment of the problem precisely mirrored the Act of 1898. Bankruptcy Act of 1867, *reprinted in* 10 COLLIER, *supra*, app. § 14, at 1752-53; Bankruptcy Act of 1898, *reprinted in id.* app. § 70(5), at 1824; *see also* *Everett v. Judson*, 228 U.S. 474, 479 (1912) (construing the line of cleavage under the Act of 1898).

6. Under the ancient theory of title by inheritance, a devise of real property vested in the beneficiary at the moment of the benefactor's death, whereas a bequest of personal property vested only upon a decree of distribution. For the historical roots of this distinction, see 3 AMERICAN LAW OF PROPERTY § 14.6 (A. James Casner ed., 1952). Nonetheless, the bankruptcy cases uniformly held that, even for personal property, the moment of death marked the time of acquisition for bankruptcy purposes. Thus, bankruptcy courts refused early on to carry the conceptual baggage of feudalism that many other courts to this day continue to lug about. While the theoretical justification for these cases was not always clear, several judges took the view that title "related back" to the moment of death. *Smith v. Lynch (In re Smith)*, 71 F.2d 378, 381 (9th Cir. 1934); *In re Mosier*, 112 F. 138, 139 (D. Vt.

to keep. And so, in a trickle of early cases, one finds debtors locked in a desperate "race with death,"<sup>7</sup> sprinting to the courthouse to file their petitions even as their benefactors lay *in extremis*, drawing their final breaths—sometimes winning (or losing) that race by only a matter of hours.<sup>8</sup>

This state of affairs drew criticism within broader reviews of the effectiveness of the Bankruptcy Act,<sup>9</sup> and in 1938 the bankruptcy amendments passed into law by the Chandler Act<sup>10</sup> altered the applicable rule. Under the revised Section 70 of the Bankruptcy Act,<sup>11</sup> reproduced with minor modifications in Section 541(a)(5) of the modern Bankruptcy Code of 1978,<sup>12</sup> the line of cleavage for *inherited* assets

1901); *Ex parte Fuller*, 9 F. Cas. 976, 977 (C.C.D. Mass. 1842) (No. 5147); *McNaboe v. Marks*, 99 N.Y.S. 960, 961 (Sup. Ct. 1906). For later cases, see *infra* note 14.

7. William F. Adler, *Some Effects of Chandler Bankruptcy Act on Other Branches of the Law*, 15 U. CIN. L. REV. 429, 430 (1941).

8. Cases in which the debtor won the race include *In re Swift*, 259 F. 612, 613 (N.D. Ga. 1919), *aff'd sub nom. Bank of Elberton v. Swift (In re Swift)*, 268 F. 305 (5th Cir. 1920) (inheritance vested 10 days after bankruptcy petition); *Baker v. Shoun (In re Baker)*, 13 F.2d 707, 707 (6th Cir.) (six days after petition), *cert. denied*, 273 U.S. 733 (1926); *In re Woods*, 133 F. 82, 82 (D. Pa. 1904) (seven days after petition); *In re Hall*, 16 F. Supp. 18, 18 (W.D. Tenn. 1936) (one hour and 45 minutes after petition). Cases in which the debtor lost include *In re McKenna*, 137 F. 611, 611 (N.D.N.Y. 1905) (inheritance vested one hour and 15 minutes before bankruptcy petition), and *In re Stoner*, 105 F. 752, 752 (E.D. Pa. 1901) (five hours before petition). For other cases marking the line of cleavage for inheritances at the moment of the petition, see *In re Wetmore*, 108 F. 520, 523 (3d Cir. 1901); *In re Lage*, 19 F.2d 153, 155 (N.D. Iowa 1927), *appeal dismissed*, 25 F.2d 288 (8th Cir. 1928); *In re Seal*, 261 F. 112, 112 (E.D.N.Y. 1919); *Ellis v. Fiske*, 232 N.W. 891, 893 (N.D. 1930); *In re Beinhauer*, 118 Misc. 527, 528 (N.Y. Sur. Ct.), *aff'd*, 194 N.Y.S. 917 (1922). The same rule applied to life insurance proceeds. *Everett*, 228 U.S. at 479; *In re Hogan*, 194 F. 846, 851 (7th Cir. 1912).

9. HOUSE COMM. ON THE JUDICIARY, 71ST CONG., 3D SESS., ADMINISTRATION OF BANKRUPT ESTATES 22 (Comm. Print 1931) (the Donovan Report); STRENGTHENING OF PROCEDURE IN THE JUDICIAL SYSTEM, S. DOC. NO. 65, 72d Cong., 1st Sess. 23 (1932) [hereinafter Thacher-Garrison Report]; Lloyd K. Garrison, *Proposed Revision of the Bankruptcy Act*, 18 A.B.A. J. 374, 376 (1932).

10. The Chandler Act evolved out of a series of draft bills prepared by the National Bankruptcy Congress, an organization of bankruptcy experts formed in 1932. For the political background and legislative history of the Chandler Act, see HOUSE COMM. ON THE JUDICIARY, 74TH CONG., 1ST SESS., BANKRUPTCY ACT, AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE U.S. (TENTATIVE DRAFT) iii-v (Comm. Print 1935) [hereinafter *The Story of the Draft*]; 1 COLLIER, *supra* note 5, § 0.07, at 17-21; Mitchell S. Dvoret, *Federal Legislation: Bankruptcy Under the Chandler Act: Background*, 27 GEO. L.J. 194 (1938); Mitchell S. Dvoret, *Bankruptcy Under the Chandler Act: Legislative History and Summary*, 27 GEO. L.J. 345 (1939).

11. Bankruptcy Act § 70(a) (previously codified at 11 U.S.C. § 110(a)).

12. Instead of the potentially ambiguous time period of "six months" found in former § 70, the Bankruptcy Code uses the more precise term "180 days." 11 U.S.C. § 541(a)(5) (1988). Additional modifications are discussed *infra* note 22. The Code took effect on October 1, 1979.

was moved forward six months. Any right<sup>13</sup> to an inheritance arising<sup>14</sup>

13. Under the Bankruptcy Act, only interests presently transferable under state law went to the bankruptcy estate, thereby exempting rights to contingent future interests (but not vested remainders) in many jurisdictions; however, if a contingent future interest in real property happened to vest in interest (thereby rendering it transferable) within the six-month period, it went to the bankruptcy estate under a separate subsection of § 70. Bankruptcy Act § 70(a)(5) & (a)(7) (previously codified at 11 U.S.C. §§ 110(a)(5) & (a)(7)); 4A COLLIER, *supra* note 5, § 70.37, at 453-62; 3 HAROLD REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 1218-1219.04, at 64-67 (5th ed. 1957); Edward C. Halbach, Jr., *Creditors' Rights in Future Interests*, 43 MINN. L. REV. 217, 238-42, 247-50 (1958). The modern Code has eliminated the limitation to transferable property, sweeping into the bankruptcy estate "all legal or equitable interests of the debtor in property," 11 U.S.C. § 541(a)(1), and the new six-month window likewise covers any interest in an inheritance "that would have been property of the estate if . . . [it] had been an interest of the debtor on the date of the . . . petition," 11 U.S.C. § 541(a)(5) (1988). Therefore, any contingent future interest, whether or not transferable under state law, should now fall into the bankruptcy estate under the Code, so long as the debtor held it prior to the petition or receives it by inheritance within six months thereafter, irrespective of when it eventually vests in interest or possession. See HOUSE COMM. ON THE JUDICIARY, BANKRUPTCY LAW REVISION, H.R. REP. NO. 595, 95th Cong., 1st Sess. 175-76 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6135-36 (stating that property of the estate "includes all interests, such as . . . contingent interests and future interests, whether or not transferable by the debtor"); see also *id.* at 367-68. The case law has not, however, been uniform in acknowledging this change. Compare *Neuton v. Danning (In re Neuton)*, 922 F.2d 1379, 1382-83 (9th Cir. 1990) (holding that contingent interests go to the bankruptcy estate so long as they have value); *Anderson v. McGowan (In re Anderson)*, 128 B.R. 850, 853-54 (D. R.I. 1991) (same); *In re Hoblit*, 89 B.R. 756, 757 (Bankr. C.D. Ill. 1986) (same); *In re Reynolds*, 50 B.R. 20, 21 (Bankr. C.D. Ill. 1985) (same); *Kloos v. Dias (In re Dias)*, 37 B.R. 584, 586-87 (Bankr. D. Idaho 1984) (same), with *Abney v. Hicks (In re Hicks)*, 22 B.R. 243 (Bankr. N.D. Ga. 1982) (holding that contingent interests that are nontransferable under state law go to the debtor), and with *In re Garten*, 52 B.R. 497, 499-500 & n.1 (Bankr. W.D. Mo. 1985) (holding that, following state law, both vested and contingent remainders constitute present interests in property). See generally George R. Pitts, *Rights to Future Payment as Property of the Estate Under Section 541 of the Bankruptcy Code*, 64 AM. BANKR. L.J. 61, 73-80 (1990) (discussing debtors' rights to contingent future interests).

14. As under bankruptcy law prior to the Chandler Act, see *supra* note 6, the relevant moment is the time when the benefactor dies, not when the inheritance is ultimately distributed. Whereas the Chandler Act referred to inheritances that "vest" within six months of bankruptcy, Bankruptcy Act § 70(a), the modern Code refers to inheritances "that the debtor acquires or becomes entitled to acquire" within that time, 11 U.S.C. § 541(a)(5). The post-1938 cases offer two alternative theories to justify this result. The first is that under state law, either (a) title to personalty "relates back" to the time of death following a decree of distribution (while title to realty actually passes on death), or (b) "equitable," if not "legal," title continuously exists in the beneficiary following the benefactor's death. The second theory is that federal law preempts state title theory for bankruptcy purposes. Cf. *Bostian v. Milens*, 193 S.W.2d 797, 803-04 (Mo. Ct. App. 1946) (holding that under state law equitable title to personalty passes to heirs upon death); *In re Berry*, No. 4285, 28 J. NAT'L ASS'N REF. BANKR. 19, 30 (1954) (D. Minn. 1953) (holding that federal law is controlling); *Balsley v. Farmer's & Merchant's Bank (In re Elliot)*, 81 B.R. 460, 462 (Bankr. N.D. Ill. 1987) (holding that under state law title to realty passes immediately upon death); *In re Olson*, 39 B.R. 872, 874 (Bankr. D. Kan. 1984) (holding that under state law realty vests when will enters probate); *In re Means*, 16 B.R. 775, 776-77 (Bankr. W.D. Mo. 1982)

up to six months after a petition<sup>15</sup> for bankruptcy relief<sup>16</sup> now pours

(holding that under state law equitable title to personalty passes to heirs upon death); *Lonstein v. Rockman* (*In re Lonstein*), 950 F.2d 77, 78-80 (1st Cir. 1991) (holding that under state law title to all property vests at death); *Caso v. Bentley* (*In re Bentley*), 120 B.R. 712, 715 (Bankr. S.D.N.Y. 1990) (holding that federal law is controlling); *Williams v. Chenoweth* (*In re Chenoweth*), 132 B.R. 161, 164-66 (Bankr. S.D. Ill. 1991) (holding that under state law passage of title relates back to the time of death), *aff'd on reh'g*, 143 B.R. 527 (S.D. Ill. 1992), *aff'd*, 1993 WL 327841 (7th Cir. 1993); *Anderson v. McGowan* (*In re Anderson*), 128 B.R. 850, 853 (Bankr. D. R.I. 1991) (holding that under state law equitable title passes on death). *But cf.* *Boatmen's Bank v. Powell* (*In re Powell*), 92 B.R. 378, 379 (Bankr. W.D. Mo. 1988) (refusing to find that an acquired legacy related back to the decedent's death) (discussed *infra* note 17).

15. Whether the case is voluntary or involuntary, the six-month period commences with the filing of the petition, not with the order for relief. 11 U.S.C. § 541(a)(5). This was also true under the prior Bankruptcy Act. C.T. Foster, Annotation, *Construction and Application of Provision of Bankruptcy Act (§ 70, subd. (a)(8)) with Respect to Property Vesting in Bankrupt After Bankruptcy By Bequest, Devise, or Inheritance*, 11 A.L.R.2d 738, 743 (1950).

16. The rule applies to relief under all chapters of the Bankruptcy Code, not merely to liquidation under Chapter 7. 11 U.S.C. § 541(a). When the debtor chooses rehabilitation under Chapters 12 or 13, property of the estate includes not only inheritances received within six months of the petition, but also any inheritances received before the case is closed. 11 U.S.C. §§ 1207 (a)(1), 1306(a)(1) (1988). If an inheritance comes into a Chapter 12 or 13 estate after a family farmer plan or wage-earner plan has been approved, the plan can be modified to reflect the debtor's enhanced ability to satisfy her creditors. *In re Euerle*, 70 B.R. 72, 73 (Bankr. D.N.H. 1987); *In re Cook*, 148 B.R. 273, 280 (Bankr. W.D. Mich. 1992) (dicta). See generally Harry L. Deffebach, Comment, *Postconfirmation Modifications of Chapter 13 Plans: A Sheep in Wolf's Clothing*, 9 BANKR. DEV. J. 153 (1992). Some debtors, having commenced cases under these chapters and then having received inheritances more than six months later but before their cases closed, have exercised their rights to convert to Chapter 7 liquidation, claiming that such a conversion operates retroactively to bar the inheritances from the estate. While some courts have upheld such claims, others have ruled that conversion of a case from one chapter to another updates the petition, and hence the attendant date of cleavage and commencement of the six-month period, to the conversion date. Compare, e.g., *In re Lybrook*, 951 F.2d 136, 136-37 (7th Cir. 1991) (Posner, J.) (holding conversion from Chapter 13 to 7 updates the petition to capture inheritances, per statutory construction and public policy) with, e.g., *Blood v. Wineburg* (*In re Marshall*), 79 B.R. 147, 149 (Bankr. N.D.N.Y. 1987) (holding conversion from Chapter 13 to Chapter 7 does not update the petition to capture preconversion accretions of property, per construction and policy) and with *Arkison v. Swift* (*In re Swift*), 81 B.R. 621, 623 (Bankr. W.D. Wash. 1987) (holding conversion from Chapter 13 to 7 when plan had not been confirmed does not update petition, and distinguishing cases involving confirmed Chapter 13 plans). And compare *In re Brownlee*, 93 B.R. 662, 665-66 (Bankr. S.D. Iowa 1988) (holding conversion from Chapter 12 to 7 updates the petition to capture inheritances, looking by analogy to the Eighth Circuit's prior Chapter 13 precedents, and ruling immaterial the fact that the Chapter 12 plan was unconfirmed) with *Arkison v. Plata* (*In re Plata*), 958 F.2d 918, 921-22 (9th Cir. 1992) (holding conversion from Chapter 12 to 7 does not update petition, looking by analogy to the Ninth Circuit's prior Chapter 13 precedent). And compare *Kepler v. Independence Bank of Madison* (*In re Ford*), 61 B.R. 913, 917 (Bankr. W.D. Wis. 1986) (holding conversion from Chapter 11 to 7 updates the petition, looking by analogy to Chapter 13 cases) (dicta) with *Koch v. Myrvold* (*In re Myrvold*), 44 B.R. 202, 204-05 (Bankr. D. Minn. 1984) (holding conversion from Chapter 11 to 7 does

back into the bankruptcy estate for distribution to creditors;<sup>17</sup> only inheritances received more than six months after bankruptcy go to the discharged debtor.<sup>18</sup> Income, on the other hand, continues to divide along the conventional line of cleavage drawn on the date of the petition.<sup>19</sup> Thus, Section 541(a)(5) *distinguishes* legacies from income and carves out an exception to the traditional policy of an *immediate* fresh start. In the wake of her petition, the debtor-beneficiary now faces a window of vulnerability that will shut only if her benefactor survives for the requisite space of time.<sup>20</sup>

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not update petition to capture inheritances, distinguishing Chapter 13), *aff'd*, 784 F.2d 862 (8th Cir. 1986). See generally Comment, *Disposition of Funds Held in Limbo: Consequences of a Conversion*, 8 BANKR. DEV. J. 211 (1991).

17. But cf. *Powell*, 92 B.R. at 379-80. There the court construed § 541(a)(5) to capture for the bankruptcy estate only interests in decedents' estates *already* in existence when the petition is filed, so long as that interest is *resolved*, by contest or lack of contest, within 180 days of the petition. The court's reasoning in *Powell* is criticized in *Bentley*, 120 B.R. at 716.

Debtors who gain rights to an inheritance within six months of the commencement of the bankruptcy case are required to file a supplemental schedule of assets with the court, notwithstanding the prior closing of the case. BANKR. R. 1007(h). Failure so to file can result in denial or revocation of the discharge. 11 U.S.C. § 727(a)(2) & (d)(2) (1988); see also *Ashton v. Sentney* (*In re Sentney*), 145 F.2d 719, 720 (9th Cir. 1944) (holding denial of discharge requires evidence that failure to file resulted from bad faith); *Gefreh v. Everetts* (*In re Everetts*), 71 B.R. 110, 112 (Bankr. D. Colo. 1987) (holding that disbursement by debtor of postpetition inheritance that belongs to the bankruptcy estate may result in revocation of discharge, but only if knowingly fraudulent). On the duty of the personal representative of the probate estate in such cases, see Adler, *supra* note 7, at 431-34.

18. *Box v. Box*, 21 N.W.2d 868 (Neb. 1946); *Myrvold*, 44 B.R. at 202; *Palmer & Palmer v. United States Trustee* (*In re Hargis*), 887 F.2d 77 (5th Cir. 1989), *clarified on reh'g*, 895 F.2d 1025 (5th Cir. 1990).

19. 11 U.S.C. § 541(a)(6) (1988).

20. This rule may be compared with British bankruptcy practice. Under one nineteenth-century bankruptcy act, debtors had to assign to the bankruptcy trustee (then known as the "provisional assignee") "all future Estate . . . which . . . may revert, descend, be devised or bequeathed, or come to him or her" in order to receive a discharge. Debtors thus lost *all* expectancies, whenever received. 7 Geo. 4, ch. 57, § 11 (1826) (Eng.); see also the form following the act. By contrast, modern British law gives the bankruptcy judge broad *discretion* to suspend the discharge or to condition it upon the debtor's consent to return any specified afteracquired property to the bankruptcy estate. MUIR HUNTER & DAVID GRAHAM, *THE LAW AND PRACTICE IN BANKRUPTCY* 122 (19th ed. 1979); Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 87, 88 & n.96, 89 (1982). While no published British cases have explored the treatment of expectancies under this provision, Canadian courts, operating under the same discretionary system, have held that a discharge should be made conditional only if the debtor is "likely to [inherit] in the immediate or near future," thus approaching the environs of § 541(a)(5) via a different route. *In re Stafford*, 37 C.B.R. (old ser.) 206, 208 (Ont. 1959); *Re Baker*, 63 C.B.R. (new ser.) 21 (Ont. 1987). For early English cases setting the sealing of the certificate of discharge as the line of cleavage for expectancies, see *Tudway v. Bourne*, 96 Eng. Rep. 1231, *aff'd*, 97 Eng. Rep. 529 (K.B. 1759); *Moth v. Frome*, 27 Eng. Rep. 262 (Ch. 1761).

Though this modern rule is relatively clear in its application,<sup>21</sup> some issues do remain. Section 541(a)(5) pertains to inherited assets and death benefits,<sup>22</sup> not to inter vivos gifts.<sup>23</sup> The treatment of prop-

One American proposal for reform of the Bankruptcy Act of 1898 advanced the British system of discretionary suspension of the discharge as a solution, inter alia, to the postpetition inheritance problem. Thacher-Garrison Report, *supra* note 9, at 23, 99-103; see also JAMES A. MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY § 122 (1956) (endorsing discretionary discharge); William O. Douglas, *Some Functional Aspects of Bankruptcy*, 41 YALE L.J. 329, 347 (1932) (same). One early legislative initiative, the unpassed Hastings-Michener Bill, called for a suspended discharge but only under specified conditions, not including anticipated inheritances. See *Full Text New Bankruptcy Bill*, 8 AM. BANKR. REV. 260, 268-69 (1932). But see *infra* note 194 for criticism of the Thacher-Garrison Report and the Hastings-Michener Bill. In the congressional hearings on the proposed Chandler Act, a drafter compared the six-month window to the British discretionary law, suggesting that the approach ultimately taken in the Chandler Act was more conservative: "But here it is a very modest restriction at best." Amendments to the Bankruptcy Act as Proposed by the National Bankruptcy Conference: Hearings on H.R. 10382 Before the House Comm. on the Judiciary, 74th Cong., 318 (1936) (statement of Paul King) (unpublished) [hereinafter H.R. 10382 Hearings].

21. For technical discussions, see 4A COLLIER, *supra* note 5, § 70.27; 4 COLLIER ON BANKRUPTCY § 541.18 (Lawrence P. King ed., 15th ed. 1992); 3 REMINGTON, *supra* note 13, § 1219.05; Foster, *supra* note 15.

22. The former § 70 included within the six-month window only property comprising a "bequest, devise or inheritance," which was construed not to encompass proceeds of a life insurance policy that matured postpetition. *Klebanoff v. Mutual Life Ins. Co.*, 362 F.2d 975, 979 (2d Cir. 1966). This language is replicated in 11 U.S.C. § 541(a)(5)(A), but the drafters of the Bankruptcy Code added another subsection making property acquired by the debtor within six months of bankruptcy "as a beneficiary of a life insurance policy or of a death benefit plan" part of the estate. 11 U.S.C. § 541(a)(5)(C); see, e.g., *Geekie v. Watson (In re Watson)*, 65 B.R. 9, 9 (Bankr. C.D. Ill. 1986) (applying § 541(a)(5)(c)); *Butler v. Sharik (In re Sharik)*, 41 B.R. 388, 389-90 (Bankr. E.D.N.C. 1984) (same). On the treatment of life insurance in bankruptcy, see also Vern Countryman, *The Use of State Law in Bankruptcy Cases, Part I*, 47 N.Y.U. L. REV. 407, 447-49 (1972) [hereinafter Countryman, *The Use of State Law*]; Walter T. Plumb, Jr., *The Recommendations of the Commission on the Bankruptcy Laws—Exempt and Immune Property*, 61 VA. L. REV. 1, 61-72 (1975); *infra* notes 126-132 and accompanying text.

*Quaere* whether a wrongful death claim falls under either § 541(a)(5)(A) or (a)(5)(C). One case decided under the Bankruptcy Act held that a wrongful death claim under the Federal Employers' Liability Act was *not* an "inheritance" under the plain meaning of § 70(a). *In re McHugh*, 75 F. Supp. 766, 767 (D. Mass. 1947), *aff'd sub nom.* *Friedman v. McHugh*, 168 F.2d 350 (1st Cir. 1948). In a subsequent case, decided under the Bankruptcy Code, the court held that a wrongful death claim *was* an "inheritance" under § 541(a)(5)(A) when, under the applicable state statute, a right of action would have belonged to the decedent had he lived and thus was "inherited" by the debtor. Thus the court distinguished *McHugh*, in which the right of action was not a "continuance" of a right which the injured party would have had but for his death. *Rose v. DeNeen (In re Hendricks)*, 22 B.R. 572, 577 (Bankr. W.D. Mo. 1982). Similarly, in *Gold v. Surowitz (In re Surowitz)*, 94 B.R. 438, 439 (E.D. Mich. 1988), the court held that a wrongful death action accruing to the decedent's estate under state law is an "inheritance" for purposes of § 541(a)(5)(A), whereas a wrongful death action accruing directly to the decedent's survivors under state law is not. The court asserted that its holding was "not . . . contrary" to *Hendricks*, although it criticized the *Hendricks* court's interpretation of state law. *Id.* at



erty acquired postpetition by virtue of nonprobate will substitutes (such as revocable inter vivos trusts, pay-on-death designations, and gifts *causa mortis*) has never been resolved.<sup>24</sup> Nor is it entirely clear

440 n.4. Neither of these opinions addresses the possible application of § 541(a)(5)(C) to a wrongful death claim, but such an interpretation would appear to contradict the plain meaning of that subsection. In another case decided under the Bankruptcy Act, property received under a divorce decree was held not to constitute an "inheritance" for purposes of former § 70. *In re Cummings*, 84 F. Supp. 65, 70-71 (S.D. Cal. 1949). The Bankruptcy Code overrides *Cummings* by capturing for the bankruptcy estate property received within six months of bankruptcy by virtue of a settlement agreement or divorce decree under 11 U.S.C. § 541(a)(5)(B). For the legislative history on this point, see REPORT OF THE COMM. ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. 2, at 149 (1973).

23. 11 U.S.C. § 541(a)(5)(A) refers only to property acquired "by bequest, devise, or inheritance." Though the issue has never been litigated, "[n]o one would suggest that the bankruptcy trustee could attach" a postpetition gift. *Scott v. Bank One Trust Co.*, 577 N.E.2d 1077, 1083 (Ohio 1991) (*dicta*).

24. Only one case adverted to the issue, noting in a significant dictum:

[The creditors] maintain, however, that in this modern age, sophisticated methods have been devised to transfer wealth from one generation to the next and that the insurance policy route is *one way* to accomplish this objective. Therefore, they say, these technical property terms in § 70(a) should be interpreted broadly to encompass insurance proceeds. This argument is spurious . . . Our guidelines of interpretation are relatively narrow; and, we are unpersuaded that we should rewrite the Bankruptcy Act in such a drastic fashion when it was simple enough for Congress to have done so.

*Klebanoff*, 362 F.2d at 979-80 (emphasis added) (holding that a revocable life insurance contract that matured within six months of bankruptcy did *not* constitute an "inheritance" for purposes of the Bankruptcy Act; see *supra* note 22). This strict mode of statutory construction, though heedless of Justice Douglas's admonition that courts not read the "words [of the Bankruptcy Act] with the ease of a computer," *Bank of Marin v. England*, 385 U.S. 99, 103 (1966), is in keeping with the current Court's approach, which has construed literally not only the words *but also the punctuation* of the Bankruptcy Code. *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241-42 (1989). See generally Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993). But other courts have held that "the question of what constitutes an inheritance under 11 U.S.C. § 541(a)(5)(A) is answered by state law." *Surowitz*, 94 B.R. at 439. If so, we face the difficulty that, under state law, will substitutes such as revocable trusts have been deemed inter vivos for some purposes (such as immunity from probate administration, see GEORGE G. BOGERT & GEORGE T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 104 (2d ed. rev. 1984)), and testamentary for others (such as taxation, see *id.* § 286, at 171-74, and federal estate taxation, see I.R.C. § 2038(a) (1992)). See WILLIAM M. MCGOVERN ET AL., *WILLS, TRUSTS AND ESTATES* § 4.7, at 193-95, § 16.8, at 792-95 (1988). Whereas will substitutes have usually been held testamentary from the standpoint of creditors' claims against the *benefactor* (though the issue remains controversial and was left unresolved under the new Uniform Probate Code, see UNIF. PROBATE CODE §§ 6-101(b), 6-212, 6-215 (1991); see generally Richard W. Effland, *Rights of Creditors in Nonprobate Assets*, 48 MO. L. REV. 431 (1983)), neither cases nor legislative history have addressed the treatment of will substitutes from the standpoint of creditors' claims against the *debtor*. If will substitutes are deemed testamentary for purposes of creditors' claims in bankruptcy, they will be deemed to be transferred when the benefactor dies and will be subject to the six-month window of § 541(a)(5)(A). If they are held to constitute

whether a debtor can avoid this provision of the Code by *disclaiming* her inheritance.<sup>25</sup> But these, and a few other wrinkles that remain to

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gifts, on the other hand, they will be deemed to be transferred when the initial instrument of gift is executed and will fall into the bankruptcy estate if that event occurred before (but not after) the petition. Moreover, if will substitutes are considered gifts, the six-month window will not apply, and the benefactor will remain free to exercise any reserved right to revoke the gift. This issue is bound to arise soon, given the soaring popularity of will substitutes. See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1115-25 (1984).

25. A disclaimer does not permit the debtor to benefit directly from the inheritance, but given that the alternative beneficiary is often another family member, the debtor will usually be able to benefit surreptitiously. See generally Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587 (1989). Under state law, the majority of jurisdictions permit an insolvent debtor to disclaim an inheritance on the theory that a disclaimer is not a "transfer," but a minority treat the disclaimer as a fraudulent conveyance. *Id.* at 591-601; Helen B. Jenkins, *Rights of Unsecured Estate Creditors Under the Uniform Fraudulent Transfer Act in Property Transferred Prior to Death*, 45 OKLA. L. REV. 275, 293-97 (1992). In a bankruptcy proceeding, the trustee can assert the rights of a creditor under state law to avoid fraudulent conveyances. 11 U.S.C. § 544(b) (1988); see also McGraw v. Betz (*In re Betz*), 84 B.R. 470, 472 (Bankr. N.D. Ohio 1987) (holding insolvent disclaimer to be a fraudulent conveyance in bankruptcy per state law without specific reference to § 544(b)). Assuming state law fails to treat an insolvent disclaimer as a transfer, however, the trustee would have to rely on his independent power to avoid fraudulent conveyances in bankruptcy under 11 U.S.C. § 548 (1988 & Supp. II 1990). Cases decided under the Bankruptcy Act § 67(d) (the precursor to § 548) nonetheless held that the power to avoid fraudulent conveyances hinged on state-law definitions of whether a disclaimed inheritance had ever "vested" in the debtor. Thus, in effect, state law determinations of whether an insolvent disclaimer constituted a fraudulent conveyance continued to control the issue. Mickelson v. Detlefsen (*In re Detlefsen*), 610 F.2d 512, 515 (8th Cir. 1979); Hoecker v. United Bank, 476 F.2d 838, 841 (10th Cir. 1973); *In re Dankner*, 384 N.Y.S.2d 683, 684 (Sur. Ct. 1976); Milens v. Bostian, 139 F.2d 282, 284-85 (8th Cir. 1943), *remanded*, 193 S.W.2d 797 (Mo. 1946) (remand for ruling on state law); cf. *In re Champion*, 5 Collier Bankr. Cas. (MB) 645, 651-52 (N.D. Ga. 1975) (holding disclaimer ineffective under state law because debtor's petition assigned the inheritance "by operation of law" to the trustee in bankruptcy, an argument rejected in *Detlefsen*, 610 F.2d at 514 n.5, 516 n.13); see also *Ex parte Fuller*, 9 F. Cas. 976, 976 (C.C.D. Mass. 1842) (No. 5147) (stating that state law exclusively governs wills of real estate). Some of these cases are discussed in David E. Leigh, Note, *Renunciation of a Legacy or Devise as a Fraudulent Transfer Under the Bankruptcy Act*, 49 IND. L.J. 290 (1974); Alice McCann, *Wills—Disclaimer Executed Within One Year of Bankruptcy Not a Transfer*, 20 WAYNE L. REV. 969 (1974). The modern Bankruptcy Code eliminates the definitional requirement that property be "vested" in order to fall into the bankruptcy estate. See 11 U.S.C. § 541(a)(1) & (a)(5). Still, the law remains unsettled: One court has distinguished disclaimers executed pre- and postpetition, holding prepetition disclaimers effective per state law and postpetition disclaimers ineffective as postpetition transfers, per 11 U.S.C. § 549 (1988). Jones v. Atchison (*In re Atchison*), 101 B.R. 556, 558 (Bankr. S.D. Ill. 1989) (Meyers, J.), *aff'd*, 925 F.2d 209 (7th Cir.), *cert. denied*, 112 S. Ct. 178 (1991). Another opinion has instead distinguished pre- and postpetition inheritances, holding only the latter, if disclaimed, to be fraudulent conveyances by virtue of federal law. Williams v. Chenoweth (*In re Chenoweth*), 132 B.R. 161, 164 (Bankr. S.D. Ill. 1991) (Meyers, J. again, contradicting himself), *aff'd*, 143 B.R. 527 (S.D. Ill. 1992), *aff'd*, 1993 WL 327841 (7th Cir. 1993). Other courts have held disclaimers void in bankruptcy without drawing either of these distinctions. Lowe v. Brajkovic (*In re Brajkovic*), 151 B.R. 402,

be ironed out,<sup>26</sup> are technical details.

407-09 (Bankr. W.D. Tex. 1993); *Casciato v. Stevens* (*In re Stevens*), 112 B.R. 175, 177 (Bankr. S.D. Tex. 1989); *Cornelius v. Cornell* (*In re Cornell*), 95 B.R. 219, 222 (Bankr. W.D. Okla. 1989); *Geekie v. Watson* (*In re Watson*), 65 B.R. 9, 12 (Bankr. C.D. Ill. 1986); *Flanigan v. Lewis* (*In re Lewis*), 45 B.R. 27, 30 (Bankr. W.D. Mo. 1984); *see also* *Nashville City Bank & Trust Co. v. Peery* (*In re Peery*), 40 B.R. 811, 816 (Bankr. M.D. Tenn. 1984) (debtor-disclaimant denied a discharge for fraud under 11 U.S.C. § 727(a)(2) (1988)). And still another court has held disclaimers valid in bankruptcy, without analysis. *In re Jessen*, 82 B.R. 490, 495 (Bankr. S.D. Iowa 1988). Several of these cases are discussed in Douglass G. Boshkoff, *Bankruptcy in the Seventh Circuit: 1991*, 25 IND. L. REV. 981, 981-83 (1992). On the debtor's right in bankruptcy to decline to exercise a spousal right to an elective share, *see In re McCourt*, 12 B.R. 587, 590-91 (Bankr. S.D.N.Y. 1981), *discussed in* THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 261-62 (1986). On the trustee's right to contest a will that could benefit the debtor, compare *Tallman v. Tallman*, 59 Mass. (5 Cush.) 325, 332 (1850); *In re Beinhauer's Estate*, 193 N.Y.S. 758 (Sur. Ct.), *aff'd*, 194 N.Y.S. 917 (App. Div. 1922), with *Caso v. Bentley* (*In re Bentley*), 120 B.R. 712, 717 (Bankr. S.D.N.Y. 1990), and *Balsley v. Farmer's & Merchant's Bank* (*In re Elliott*), 81 B.R. 460, 462 (Bankr. N.D. Ill. 1987).

Compare the reverse scenario in which a debtor is not the disclaimant but rather the *beneficiary* of disclaimed property. In one case, a benefactor died prior to the debtor's bankruptcy petition, and the named beneficiary subsequently disclaimed her inheritance to the debtor as alternative beneficiary more than six months *after* the petition. *Held*, the inheritance nonetheless went to the bankruptcy estate because, under state law, title to the disclaimed inheritance "related back" to the date of the benefactor's death. *Norman v. Schulte* (*In re Schulte*), 107 B.R. 763, 764 (Bankr. D. Wyo. 1989).

The debtor might also assign her expectancy to a third party *before* it vests. But assignments of expectancies are effective against the beneficiary and the trustee in bankruptcy only if made for consideration and only in the absence of fraud. *In re Cornell's Will*, 12 N.Y.S.2d 162, 165 (Sur. Ct. 1939); *In re Barnett*, 37 F. Supp. 531, 532 (E.D.N.Y. 1941), *rev'd*, 124 F.2d 1005 (2d Cir. 1942). For discussions, *see* 3 AMERICAN LAW OF PROPERTY, *supra* note 6, § 14.12; MCGOVERN ET AL., *supra* note 24, § 1.5, at 29; Foster, *supra* note 15, at 743-44.

26. Case law interpreting the Chandler Act upheld the debtor's right to claim exempt property out of a postpetition inheritance that belonged to the bankruptcy estate under § 70(a). *In re Carl*, 38 F. Supp. 414, 417 (W.D. Ark. 1941) (homestead rights). Section 70(a) of the Bankruptcy Act was amended in 1952 to codify *Carl*. Pub. L. No. 82-456, 66 Stat. 420, 430 (1952); *see In re Hamill*, 317 F. Supp. 909, 914 (D. Kan. 1970). The modern Bankruptcy Code has *eliminated* this language but simultaneously overhauled the structure of the bankruptcy estate. Whereas the Bankruptcy Act had failed to include exempt property in the initial bankruptcy estate (leaving the reference to after-acquired property in the Chandler Act ambiguous), the modern Code *includes* exempt property *a priori* and then disgorges it back to the debtor under 11 U.S.C. § 522 (1988). Because § 541(a)(5) merely captures inherited property for the bankruptcy estate, it is again subject to exemptions from the bankruptcy estate under § 522(b). *In re Means*, 16 B.R. 775, 776-77 (Bankr. W.D. Mo. 1982); *In re Howard*, 6 B.R. 220, 223 (Bankr. S.D. Ohio 1980). For other related cases, *see* DAVID G. EPSTEIN ET AL., *BANKRUPTCY* 595 n.11 (1993). *See also infra* notes 126-132 and accompanying text.

The treatment of a debtor's right to receive a family allowance out of a probate estate under §§ 541(a)(1) & (a)(5) remains somewhat ambiguous. In *In re Stumpff*, 107 B.R. 346, 349 (Bankr. E.D. Okla. 1989), *order restated*, 109 B.R. 1014 (Bankr. E.D. Okla. 1989), the court held that a debtor's interest in the allowance accrued for purposes of inclusion in the bankruptcy estate at the time when the probate court entered its *order* allowing the pay-

The larger, more interesting question is whether the six-month window serves to fulfill public policy. Is this a well-advised rule? Commentators have had remarkably little to say about it,<sup>27</sup> and the legislative history is equally scant.<sup>28</sup> The new line of cleavage constituted just one strand in the tangle of innovations introduced by the Chandler Act,<sup>29</sup> and it crept into law with scarcely any critical discussion.<sup>30</sup> Yet the issue merits greater scrutiny than it has heretofore re-

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ment stream, rather than when the payments were actually made, or (implicitly) when the benefactor died. *Stumpff*, 109 B.R. at 1016. This treatment is inconsistent with other courts' handling of ordinary bequests. See *supra* notes 6 & 14. In its initial statement of its holding, the court ruled that the date of distribution was not dispositive (without specifying, as the restatement did, what the legally significant date was), emphasizing that its holding depended on the state-law rule that an allowance is an "advance" on, rather than an addition to, the beneficiary's initial right to an estate distribution. *Stumpff*, 107 B.R. at 348. Melding the two opinions, one is led to the odd (to say the least) conclusion that the court would date to the post-mortem court order allowances that are advances, but date to the time of distribution allowances that are (under state law) additions to the beneficiary's inheritance rights under the will. This legal issue needs clarification.

The status of a third party's inheritance right that has been assigned to the debtor for consideration (the assignment would not otherwise be enforceable) also remains unclear. In an early case, the Sixth Circuit held that the assignment of an inheritance to the debtor still constituted an expectancy rather than a chose in action (and because the case was decided prior to the Chandler Act, the court did not have to decide the further question of whether an *assigned* expectancy, escaping the bankruptcy estate initially, would then be subject to the six-month window as a potential inheritance of the *debtor*). *Baker v. Shoun* (*In re Baker*), 13 F.2d 707, 708 (6th Cir.), *cert. denied*, 273 U.S. 733 (1926). Though the issue has never been relitigated, commentators have uniformly rejected *Baker*, urging that an expectancy assigned to the debtor for consideration should be deemed a chose in action and hence should fall into the bankruptcy estate initially, regardless of when it vests. 2A RICHARD R. POWELL, *THE LAW OF REAL PROPERTY* § 384 (Patrick J. Rohan ed., rev. ed. 1992); 1 AMERICAN LAW OF PROPERTY, *supra* note 6, § 4.80, at 541 & n.4 (1952); RESTATEMENT OF PROPERTY § 317(2) & cmt. b (1940); Recent Decisions, 27 COLUM. L. REV. 86, 87 (1927); Recent Case Notes, 36 YALE L.J. 272, 272-73 (1926). Compare the treatment of contractual wills, discussed *infra* note 116. On spendthrift trust income under § 541(a)(5), see *infra* note 222; on the constitutionality of § 541(a)(5), see 4A COLLIER, *supra* note 5, § 70.27, at 374 n.6.

27. The issue has never before been the subject of a published note or article. Scattered commentary on the problem will appear hereinafter.

28. See *infra* notes 33, 71-77, 150, and accompanying text.

29. In urging passage of the Chandler Act, Professor MacLachlan described this, along with other changes in the contours of the bankruptcy estate, as "a small portion of the subject matter of the Bill," a "negligible modification . . . [that] could readily be dropped [if opposition were encountered] without substantially impairing its usefulness." James A. McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, 4 U. CHI. L. REV. 369, 381 (1937). (I will note here to spare the reader further confusion that MacLachlan altered the spelling of his name in 1948; his early publications bear his original surname.)

30. The six-month window was not highlighted among the "general purposes" of the drafters of the Chandler Act in their preface to their legislative analysis. HOUSE COMM. ON THE JUDICIARY, 74TH CONG., 2D SESS., ANALYSIS OF H.R. 12889 iv-v (Comm. Print

ceived. Though inheritances raise only a peripheral problem under the theory of the fresh start, still that theory represents one of the central components of bankruptcy law. By probing the periphery, we may glean insights into forces operating at the core. But putting aside for the moment these broader concerns, this Article advances the specific hypothesis that Section 541(a)(5) is theoretically faulty and ought to be repealed. As will be shown, the existing rule lacks rhyme or reason: *rhyme*, in the sense that the rule is logically inconsistent with other provisions of the Bankruptcy Code; *reason*, in that it fails intrinsically to comport with public policy.

In the analysis that follows, I will begin by exploring the stated rationales for the six-month window and examining their persuasiveness as policy dogma. I will then free myself from the existing dogma and address the provision from an analytical perspective neglected by its drafters. Finally, having completed this exercise, I will remark a few lessons learned in the course of it about the discharge and about the process of bankruptcy lawmaking that permitted a rule so ill-conceived as the six-month window to come into being in the first place.

### III. Justifications Shattered in the Unpacking

A number of rationales for the six-month window appeared, or

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1936) [hereinafter ANALYSIS OF H.R. 12889]. The voluminous papers of the principal drafter of the revised § 70, containing many substantive discussions of other aspects of the section, include none on the six-month window. See James Angell MacLachlan Papers, Harvard Law School Library, ms. boxes 1-3 (unpublished papers) [hereinafter MacLachlan Papers]. Similarly, in the Congressional hearings on the Chandler Act, the issue was barely discussed. In the first hearing, Paul King, one of the drafters, briefly described the six-month window and invited questions; there were none. *Revision of the Bankruptcy Act: Hearings on H.R. 6140 Before the House Comm. on the Judiciary, 74th Cong., 1st Sess.*, pt. 2, at b14-15 (1935) (statement of Paul King) (unpublished). In the second hearing, the issue was debated for several minutes. H.R. 10382 Hearings, *supra* note 20, at 315-18. In the third and final hearing, James MacLachlan, another drafter, failed to mention the innovation in a discussion ostensibly "cover[ing] the most important . . . changes in language which have been made" in § 70. *Revision of the Bankruptcy Act: Hearings on H.R. 6439 Before the House Comm. on the Judiciary, 75th Cong., 1st Sess.* 210-12 (1937) (statement of James A. MacLaughlin) [hereinafter *H.R. 6439 Hearings*]. Nonetheless, in the one brief debate on the issue, Congressman Chandler himself praised the six-month window as "a very valuable section." H.R. 10382 Hearings, *supra* note 20, at 318. The drafters of the Bankruptcy Code of 1979 failed to revisit the issue; the decision to carry forward the six-month window from the Act to the Code was taken without any substantive discussion. For the legislative history, see H.R. Doc. No. 137, *supra* note 22, pt. 1, at 192-93; *id.* pt. 2, at 147, 149; *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st & 2d Sess.* app. § 4-601(a)(4) (1975); H.R. REP. NO. 595, *supra* note 13, at 176.

were alluded to, in the legislative history of the Chandler Act.<sup>31</sup> Taken as a whole, these rationales form the ostensible theoretical foundation for the six-month window. To assess the rule, we must begin by testing the soundness of that foundation.

### A. Reliance Theory

The official revision notes accompanying the Chandler Act contain only one scrap of commentary explicitly directed at justifying the six-month window. The statement was attributed to Jacob Weinstein, a practitioner and treatise writer, who served prominently on the Act's drafting committee.<sup>32</sup> The passage reads in its entirety:

These provisions are also intended to correct an abuse which is quite prevalent. Liberal credits are frequently extended by tradesmen in reliance upon such expectancies, and quite often such debtors invoke the [Bankruptcy] Act to escape payment. This is virtually a fraud upon the Act and should be discouraged.<sup>33</sup>

While the meaning of this brief discourse is not entirely clear, Weinstein appears to be saying that when a potential borrower with prospects of inheritance seeks credit, the parties will typically (if implicitly) agree that any inherited assets will be made available to satisfy the debt. A declaration of bankruptcy effective against an im-

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31. Earlier criticisms of the pre-Chandler Act rule failed to address the issue substantively. *See supra* note 9.

32. Weinstein, who practiced law in Philadelphia, was a member of the Bankruptcy Committee of the Commercial Law League of America, the National Association of Federal Practitioners, and the National Bankruptcy Conference (though he did not begin to participate until its third session in 1933). Weinstein served on the subcommittee of the Conference that drafted the revised § 70. The Story of the Draft, *supra* note 10, at 263-65. It was Weinstein who, along with two other participants (Professor James MacLachlan of the Harvard Law School and Watson B. Adair of the National Association of Referees in Bankruptcy), composed the final language of the six-month window as it appeared in the Chandler Act. Letter from Watson B. Adair to Paul H. King (Mar. 1, 1937), in MacLachlan Papers, *supra* note 30, ms. box 2, folder 11. Following passage by Congress, Weinstein published a treatise on the entire Act. JACOB WEINSTEIN, *THE BANKRUPTCY LAW OF 1938* (1938). On his eminence in the field, see *Other Amendatory Proposals*, 6 J. NAT'L ASS'N REF. BANKR. 175, 175 (1932).

33. ANALYSIS OF H.R. 12889, *supra* note 30, at 226 n.4; REVISION OF THE NATIONAL BANKRUPTCY ACT, H.R. REP. NO. 1409, 75th Cong., 1st Sess. 34 (1937) (same, without attribution); *Senate Judiciary Committee Report No. 1916—Revision of the National Bankruptcy Act Reproduced*, A2 CORP. REORGANIZATION & AM. BANKR. REV. 199, 211 (1939) (same, abbreviated) [hereinafter *Report No. 1916*]. Weinstein repeated this argument in his Congressional testimony advocating passage of, and subsequently in his treatise examining, the Chandler Act. H.R. 10382 Hearings, *supra* note 20, at 316-17 (statement of Jacob I. Weinstein); WEINSTEIN, *supra* note 32, at 158. The author of an earlier critique of the Bankruptcy Act of 1898 had similarly characterized the action of declaring bankruptcy in order "to retain an expected inheritance" as one of several "border-line cases just short of outright fraud." Garrison, *supra* note 9, at 376.

pending inheritance would therefore deprive creditors of the benefit of their bargains.

The first thing to notice about this rationale is that it fails to correspond precisely with the rule it purports to justify. If it is "fraudulent" to use bankruptcy to protect an inheritance that creditors are relying on, then those creditors should be permitted to reach it *when-ever* it vests, as long as they can maintain a writ of execution.<sup>34</sup> But even ignoring this imprecision, Weinstein's analysis appears untenable. His bold empirical assertion that "liberal credits" are "frequently" extended in reliance on expectancies is—in this day and age—palpably false. Perhaps back in 1938 creditors had sufficiently close personal relations with their debtors to become acquainted with their prospects of inheritance.<sup>35</sup> Be that as it may, the revolution in consumer credit following the Second World War has seen the industry burgeon; in the process, the business of lending has grown impersonal and routine.<sup>36</sup> Today, consumer credit dossiers do *not* routinely

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34. Conceivably, Weinstein might have argued that the likelihood of reliance on expectancies was greater when they in fact matured within six months of the petition (although temporal proximity between maturity of the expectancy and the date credit was extended would appear a more pertinent consideration). In the one congressional hearing on the six-month window, the time period selected for the provision was briefly discussed. One Congressman wondered why the period chosen for capturing inheritances differed from the period chosen for avoiding preferences. Weinstein responded that "[t]here is no particular relation between the two." At the same time, he allowed that the six-month period was "arbitrary" and was "a compromise." The chairman of the National Bankruptcy Conference, Paul King, weighed in that "[y]ou might possibly make it a year without going too far." Congressman Chandler defended the time period as it appeared in the draft: "Six months would seem to me to be about the right period of time. If you made it longer possibly you would work a hardship, and if you made it shorter possibly you would work a hardship." H.R. 10382 Hearings, *supra* note 20, at 317-18. Unfortunately, Chandler failed to expand on his perception of the nature of these "hardships." For other possible policy explanations for the six-month limitation, see *infra* note 85 and text accompanying notes 137, 138, 152, & 153. For proposals to extend the window of vulnerability, see *infra* notes 82-83.

35. Although studies are lacking, there is reason to doubt whether such personal relations were widespread even in 1938. A substantial expansion in consumer credit had occurred in the 1920s, and the sales finance companies (though not yet the credit card) had already appeared by this time. MARTHA L. OLNEY, *BUY NOW PAY LATER: ADVERTISING, CREDIT, AND CONSUMER DURABLES IN THE 1920s*, at 86-134 (1991). Gordon Wood finds that credit transactions grew dramatically in volume and became increasingly impersonal as early as the late eighteenth century! GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION 65-70*, 139-41 (1991).

36. On the growth of consumer credit and its present impersonal nature, see NATIONAL COMMISSION ON CONSUMER FINANCE, *CONSUMER CREDIT IN THE UNITED STATES 5-21* (1972) [hereinafter NATIONAL COMMISSION]; DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM 24-27* (1971); TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS 12-13*, 337 (1989). For a recent popular account, see Nancy Shepherdson, *Credit Card America*, AM. HERITAGE, Nov. 1991, at 125.

include information about the debtor's inheritance prospects.<sup>37</sup> Commercial lenders instead focus on present assets and income—and with good reason. Before they mature, wills are private documents. Information about their contents is difficult to obtain. Moreover, wills (true to their name) are ambulatory. A benefactor can alter his will at will. As a consequence, the “present value” of the expectancies it creates, if otherwise subject to actuarial estimation, will remain indeterminate. Only in a few special cases, where the debtor's expectancies are notorious and realistically secure, might creditors nowadays agree to consider them when deciding whether (and at what price) to extend credit. Weinstein's observation, in short, is at best anachronistic—and quite possibly was spurious to begin with.<sup>38</sup> If anything, a reliance theory subverts, rather than supports, an across-the-board inclusion of expectancies in the bankruptcy estate.<sup>39</sup>

Even if we were to focus on those special cases in which the decision to extend credit *is* (or could efficiently be) predicated on the debtor's inheritance prospects, Weinstein's analysis still misses the mark. “Reliance” does not occur in a vacuum. Debtors and creditors bargain in the proverbial shadow of the law (as well as extralegal social norms). They *reasonably* rely on whatever the law (and those norms) make available for reliance.

Consider first the applicable social norms.<sup>40</sup> When a debtor

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37. See Hirsch, *supra* note 25, at 614 & nn.132-35.

38. See *supra* note 35. Even at an earlier time, when information about debtors was less costly as a consequence of communal notoriety, the ambulatory nature of expectancies must have cast doubt on their usefulness as a substitute for vested collateral. For a literary depiction of such an arrangement (also illustrating its dangers to creditors), see GEORGE ELIOT, *MIDDLEMARCH: A STUDY OF PROVINCIAL LIFE* 93-96 (Knopf 1991) (1871-72).

39. See *infra* note 45. On this basis one could even argue that *vested* inheritances should be exempt from the claims of creditors who extended credit before the inheritances were received, although such a rule would entail administrative difficulties. Hirsch, *supra* note 25, at 626. Several of the cases decided prior to the Chandler Act denied creditors recourse to expectancies in bankruptcy on the related technical ground that they were *valueless*, and thus did not fit the definition of “property” of the debtor under § 70 of the Bankruptcy Act. As one opinion noted, inheritance prospects “could [not] be sold to strangers for any price” because they “depended upon the mere wish of the [benefactor].” The benefactor “could . . . at any moment” execute a new will, “and the subject-matter of these expectancies would dissolve into nothing.” *Baker v. Shoun* (*In re Baker*), 13 F.2d 707, 707-08 (6th Cir. 1926); for similar discussions, see *Hogan v. Fauerbach Brewing Co.* (*In re Hogan*), 194 F. 846, 849 (7th Cir. 1912), *cert. denied*, 273 U.S. 733 (1926); *In re Wetmore*, 108 F. 520, 523-24 (3d Cir. 1901); *In re Seal*, 261 F. 112, 112 (E.D.N.Y. 1919); see also *Lockard v. Stephenson*, 24 So. 996, 996-97 (Ala. 1899); *In re Shepard's Estate*, 32 A. 1040, 1041 (Pa. 1895) (same analysis in related contexts).

40. On the phenomenon of extralegal social norms, see generally JON ELSTER, *THE CEMENT OF SOCIETY* (1989). That these play a significant role even in business relationships is well known. See generally William M. Evan, *Comment*, 28 AM. SOC. REV. 67, 67-69



brings an expectancy to the attention of her creditor, could that creditor (operating, so to say, in a state of nature) reasonably assume that the debtor would subsequently take no evasive action to shield the expectancy from that creditor? Weinstein seems to have thought so, but can we be so sure? The prevailing culture (if we can even generalize about it) appears to combine attitudes of trust and suspicion, of duty and rivalry,<sup>41</sup> and judicial pronouncements historically have reflected this dialectic. In 1842, Justice Story *defended* the reliance interest of creditors: "As an honest debtor, he must desire, that his creditors should derive as much benefit from all his 'rights of property,' as is possible."<sup>42</sup> Yet other contemporaries of Story took the opposite view: "[A] great part of human conduct, in this imperfect world, proceeds [from unworthy passions and motives]," observed a state court justice in 1879; "The right, especially, to harry and bedevil one's creditor is inestimable!"<sup>43</sup> Presumably, many creditors would *expect* debtors to do all they could to wriggle free from their obligations, even when debtors initially flaunted proof of their credit-worthiness. Any other expectation would be commercially reckless—not to say self-destructive—in the face of evidence to the contrary. In this light, Weinstein's assertion that credit was "*frequently* extended by tradesmen in reliance upon . . . expectancies," which debtors then "*quite often*" contrived to deny them,<sup>44</sup> appears logically inconsistent, assuming creditors act rationally. Reliance could not long have survived such evasion: Once bitten, twice shy. The frequency of credit extension on the basis of inheritance prospects must have plummeted the moment debtors began defying their creditors' genial expectations.<sup>45</sup>

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(1963); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55-67 (1963); Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465.

41. Social commentators have often depicted debtors' attitudes as ambivalent: "'Honest men,' writes a trade executive, 'are straining at the moral code that makes debts an honorable bargain.'" Thatcher-Garrison Report, *supra* note 9, at 13. Others have noted a variation of attitudes: "[S]ome debtors, although perhaps a small, but nonetheless appreciable, minority . . . feel a moral obligation to . . . repay as much of their debts as possible." *In re Arnold*, 869 F.2d 240, 243 (4th Cir. 1989). For a recent discussion, see Lisa J. McIntyre, *A Sociological Perspective on Bankruptcy*, 65 IND. L.J. 123, 128-37 (1989).

42. *Ex parte Fuller*, 9 F. Cas. 976, 977 (C.C.D. Mass. 1842) (No. 5147).

43. *Daniel v. Frost*, 62 Ga. 697, 707-08 (1879) (Bleckley, J.).

44. ANALYSIS OF H.R. 12889, *supra* note 30, at 226.

45. In only one case reported prior to the Chandler Act did a general creditor expressly assert that his decision to extend credit was premised on the debtor's representation of inheritance prospects. *In re Seal*, 261 F. 112, 112 (E.D.N.Y. 1919).

But even assuming the expectations reported by Weinstein existed as a cultural starting point, what of the law? Formal legal rules also shape expectations, and do so powerfully. Moreover, legal rules define expectations as a matter of *right*. If lawmakers were to decide that inherited property, *whenever* received, was exempt from creditors' claims, for example, no unsecured creditor would *or could* rely on it. A debtor exercising her right to the exemption in these circumstances could hardly be accused of fraud, much less a "fraud upon the [law]."<sup>46</sup> Nor would such an exercise present any substantive inequity. The price of credit would adjust accordingly.

This point of jurisprudence—that the law delineates enforceable reliance—surely comes as no revelation. It has been often averred, by scholars<sup>47</sup> as well as judges in bankruptcy and other related cases,<sup>48</sup> to

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46. Cf. *supra* text accompanying note 33. This is an intriguing concept, one that Weinstein failed to explain, let alone explore. Indeed, the whole idea seems logically tenuous. It may well be possible to defy the "spirit" of a law, when one insists on following its letter in situations not intended or anticipated by its makers. That would appear to be what Weinstein has in mind here. But is that "fraud," even when done knowingly, or just clever lawyering? To borrow a leaf from those bespectacled folk who carry calculators in their breast pockets, there is a difference between *avoiding* and *evading* taxes. So long as one obeys the law, one commits no fraud. But, fraud aside, one could argue (as Learned Hand has done in a famous tax opinion) that courts should *construe* statutes liberally, to encompass their spirit. See *Helvering v. Gregory*, 69 F.2d 809, 810-11 (2d Cir. 1934) (Hand, J.), *aff'd*, 293 U.S. 465 (1935); see also Marvin A. Chirelstein, *Learned Hand's Contribution to the Law of Tax Avoidance*, 77 YALE L.J. 440, 444-46 (1968) (discussing *Helvering*). Such an approach, applied to the old § 70, could have led to a different outcome in the pre-Chandler Act cases. See *supra* note 8 and accompanying text. Some modern bankruptcy courts have denied relief to debtors who attempted "abuses of the provisions, purposes, or spirit of bankruptcy law," on the ground that "[g]ood faith is an implicit jurisdictional prerequisite." *In re Campbell*, 124 B.R. 462, 464 (Bankr. W.D. Pa. 1991). But this good faith requirement has never been applied to the *timing* of a petition. See *infra* notes 161-162 and accompanying text.

47. "So far as the prevention of disappointment is concerned . . . [i]f the laws change, the expectations will change. Thus the more important issue, as Sidgwick saw nearly a century ago, is not whether the law should prevent the disappointment of expectations, but whether it should create such expectations in the first place." STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 401-02 (1990) (citing HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 98 (London, MacMillan 1891)). And again: "A promise has present value, why? Because the law enforces it. 'The expectancy,' regarded as a present value, is not the cause of legal intervention but the consequence of it . . ." L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 59-60 (1936). Cf. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 9-9, at 615-16 (2d ed. 1988) (noting that even a jurisprudence sanctioning reliance on the basis of existing legal rules is logically shaky, because the meta-rule that law is changeable implies that prospective changes in legal rules can be anticipated).

48. Thus, the Supreme Court rejected the argument that the discharge under state insolvency laws was unconstitutional under the Contracts Clause, so long as those laws only applied prospectively:

reject arguments of creditor reliance—even explicit reliance—when maintained without legal warrant. Indeed, one court recently reiterated the point to reject a claim of explicit reliance on an inheritance that vested *more* than six months after bankruptcy—a claim precisely analogous to the ones cited by Weinstein to justify deviation from the *old* line of cleavage set prior to the Chandler Act.<sup>49</sup>

To the extent, then, that law is the root of reasonable expectations, Weinstein's analysis collapses into tautology: Creditors need law to vindicate their expectations if and when the law itself creates those expectations. Considered in this vein, Weinstein has placed the social cart before the legal horse.

But perhaps Weinstein's point was that because, *arguendo*, creditors would rely on known inheritance prospects in the absence of legal rules, laws should be crafted to sustain those "pre-existing" expecta-

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[The municipal law of the State] forms, in my humble opinion, a part of the contract, and travels with it wherever the parties to it may be found. . . .

. . . [It is not] unjust, or oppressive, to declare by law, that contracts subsequently entered into, may be discharged in a way different from that which the parties have provided, but which they know, or may know, are liable . . . to be discharged in a manner contrary to the provisions of their contract.

Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 259, 267 (1827). Likewise, in connection with preferences under the Bankruptcy Code,

Rules of law affecting parties to voluntary arrangements do not operate 'inequitably' in the business world—at least not once the rule is understood. . . . If the extended preference period facilitates the operation of bankruptcy . . . then credit will become available on slightly better terms. If . . . [it] has the opposite effect, creditors will charge slightly higher rates of interest and monitor debtors more closely.

Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186, 1198 (7th Cir. 1989).

The reliance argument has also been rejected in cases upholding the effectiveness of spendthrift trusts: "It is argued that investing a man with apparent wealth tends to . . . induce [creditors] to give him credit. The answer is, that creditors have no right to rely upon property thus held . . . ." *Broadway Nat'l Bank v. Adams*, 133 Mass. 170, 173 (1882). Likewise: "To property so exempted the creditor has no right to look, and does not look, as a means of payment when his debt is created . . . ." *Nichols v. Eaton*, 91 U.S. 716, 726 (1875); *see also* *Fox v. Swartz*, 51 N.W.2d 80, 85 (Minn. 1952) (applying the same principle to exempt life insurance policies); *Magill v. Newman (In re Newman)*, 903 F.2d 1150, 1151 n.1 (7th Cir. 1990) (noting that the argument of explicit reliance was raised improperly on appeal). In still another setting, where a prospective borrower who was also the donee of a power of appointment informed his prospective lender that he had exercised the power under his will (thereby rendering it susceptible to the claims of his own creditors under state law), the court refused to imply a legally permissible agreement by the donee not to revoke the will (unexercised powers being immune to creditors' claims). "A will is ambulatory until death. . . . That is common knowledge with which the appellant creditors are chargeable . . . ." *Montague v. Silsbee*, 105 N.E. 611, 612 (Mass. 1914).

49. *Bowers Distillery, Inc. v. Kragness (In re Kragness)*, 63 B.R. 459, 464 (Bankr. D. Or. 1986) (rejecting estoppel argument by creditor that debtor "specifically promised to pay the debt owed to plaintiff from this specific asset").

tions. In other words, law should be responsive to, rather than responsible for, social reliance. That is hardly a senseless notion. Citizens do live by social norms. To the extent formal rules are molded to reflect those norms, lawmakers avoid dissonance between what the law tells citizens is right and what they themselves preconceive to be right.<sup>50</sup>

At the same time, this approach need not be followed remorselessly. When public policy so dictates, lawmakers may find it expedient to overrule social norms precisely in order to change them. To suggest that legal sanctions must invariably mirror their extralegal counterparts would be to fall prey to a variant of the Is-Ought fallacy that philosophers since Hume have so delighted in puzzling over.<sup>51</sup> The mere fact that a particular social norm exists (no matter how undesirable or even ugly) does not imply that lawmakers ought to sponsor it.<sup>52</sup> Were Weinstein's (presumed) argument accepted and applied rigorously to creditors' rights in bankruptcy, it would prove far too much. On this theory, no discharge could *ever* be granted because, absent that *legal* right, unsecured creditors would rely on their debtors' future income streams!<sup>53</sup> That lawmakers nonetheless created (even exalted) the right of discharge, along with plenty of other rights in virtually every facet of the law, makes plain the jurisprudential frailty of Weinstein's position.

Ultimately, the key issue is not what expectations *do* debtors and creditors entertain, but rather what expectations do lawmakers *want* them to entertain? The balance of this Article will be devoted to an-

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50. For a brief but interesting discussion, see KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 480 (1962). See also *infra* note 238.

51. The classic statement of the fallacy appears in DAVID HUME, A TREATISE OF HUMAN NATURE 469-70 (L.A. Selby-Bigge ed., 2d ed. 1978) (1739-40). For more recent discussions, see, e.g., THE IS-UGHT QUESTION: A COLLECTION OF PAPERS ON THE CENTRAL PROBLEM IN MORAL PHILOSOPHY (W.D. Hudson ed., 1969); Lawrence Kohlberg, *From Is to Ought: How to Commit the Naturalistic Fallacy and Get Away with It in the Study of Moral Development*, in COGNITIVE DEVELOPMENT AND EPISTEMOLOGY 151 (Theodore Mischel ed., 1971). Scholars sometimes turn the fallacy around, committing what I call the "Ought-Is" fallacy. Thus, for example, exponents of the Chicago School of law and economics argue that law *ought* to be efficient, and, lo and behold, often discover that it *is*. See J.M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447 (1987) (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987)).

52. The area of equal protection law leaps readily to mind—and also illuminates the deeply conservative nature of Weinstein's commentary when generalized into a peremptory, jurisprudential directive.

53. Weinstein's argument has been raised and rejected in the context of the discharge. See *supra* note 48.

swering this question in connection with inheritance rights, but we may begin here with one general proposition: All else being equal, society is best off when creditors can expect to satisfy their debts from *any* of the debtor's interests in property. The broader the creditor's opportunity for reliance, the more robust will be the market for credit which will in turn channel resource to their most efficient users.<sup>54</sup> And, as it happens, state law has traditionally empowered creditors to rely on just about anything. Even exempt property can be made subject to enforceable creditors' claims via the grant of a security interest covering the property.<sup>55</sup> Similarly, under state law, creditors can assure themselves of recourse to a debtor's expectancies by demanding an assignment of inheritance rights, or by demanding a waiver of the right to disclaim an inheritance once it has vested.<sup>56</sup>

Federal bankruptcy law, however, has traditionally functioned differently. General propositions aside, lawmakers have found compelling policy reasons for denying creditors the opportunity to rely on certain interests of the debtor in the event she becomes insolvent. One of those interests is the debtor's future income stream. Were a lender foolish enough to extend "liberal credits" in reliance on an insolvent debtor's prospective income, that lender would soon become insolvent as well, for the debtor's right to seek a discharge, freeing up her future earnings, will defeat any claim of "reliance." Were creditors to solicit a waiver of this right, their efforts would be futile—under the Bankruptcy Code, the discharge cannot be waived *ex ante*.<sup>57</sup> Whether this ought to be so is a question we shall put off for just a little while.<sup>58</sup> The point to be made here is simply that Weinstein's suggestion that reliance justifies a limitation on the discharge (by redrawing the temporal boundaries of the bankruptcy estate) contra-

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54. See, e.g., Anthony T. Kronman & Richard A. Posner, *Introduction: Economic Theory and Contract Law*, in *THE ECONOMICS OF CONTRACT LAW* 1-2 (Anthony T. Kronman & Richard A. Posner eds., 1979).

55. DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 31 (rev. ed. 1993). One exception is the spendthrift trust, which creditors cannot reach by way of express agreement with the debtor. Cf. 2A AUSTIN W. SCOTT, *THE LAW OF TRUSTS* § 152.6 (William F. Fratcher ed., 4th ed. 1987 & Supp. 1992) (on the assignment of income out of a spendthrift trust).

56. Assignments to creditors of expectancies before they vest have generally been upheld in equity under state law. E.g., *In re Cunningham's Estate*, 16 A.2d 712 (Pa. 1940). See generally 3 *AMERICAN LAW OF PROPERTY*, *supra* note 6, § 14.12. Likewise, *ex ante* waivers of the right to disclaim are enforceable under state law. See UNIF. PROB. CODE § 2-801(d)(3) & (e)(ii) (1991). If the expectancy has been assigned, then disclaimer is generally barred under state law, even absent a waiver. See *id.* § 2-801(e)(i).

57. 11 U.S.C. § 524(a) (1988).

58. See *infra* text accompanying notes 105-106.

dicts the longstanding supposition that federal law preserves the right to bankruptcy relief irrespective of the wishes or expectations of the bargaining parties. And this supposition has traditionally applied to expectancies as well as to income. The *locus classicus* of this approach is the *Local Loan* case of 1934, in which the Supreme Court ruled that an assignment of future wages to a creditor, creating a lien on those wages, was dissolved by the discharge, even though liens ordinarily "pass through" bankruptcy and remain effective despite discharge.<sup>59</sup> To permit the debtor to create an effective lien against her own wages, making the discharge functionally waivable, would have contradicted, in the Court's emphatic words, "the clear and unmistakable policy of the [B]ankruptcy [A]ct."<sup>60</sup>

A parallel line of bankruptcy cases, originating *before* the Chandler Act and continuing *after* it, reached the same result with respect to inheritances.<sup>61</sup> The rule is now codified into Section 552(a) of the Bankruptcy Code, which stipulates that the discharge avoids all liens over "*property acquired*," not just wages earned, "after the commencement of the [bankruptcy] case."<sup>62</sup> One can discern a clear disharmony between this provision and the six-month window presently lodged in Section 541(a)(5) of the Code.<sup>63</sup> Section 541(a)(5) tells creditors that they *can* rely on the right to satisfy their claims from inheritances received up to six months after a petition for relief. To the contrary, Section 552(a) tells them that they cannot rely *expressly* on that right by soliciting a priority lien on, or an assignment of, a debtor's expectancy. Such a lien or assignment will be void under Sec-

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59. *Local Loan Co. v. Hunt*, 292 U.S. 234, 242-43 (1934).

60. *Id.* at 244.

61. *Brown v. Cunningham*, 25 N.E.2d 113 (Ill. 1940) (holding assignment of expectancy avoided by the discharge in bankruptcy); *Gannon v. Graham*, 231 N.W. 675, 679-80 (Iowa 1930) (same); see also *Bowers Distillery, Inc. v. Kragness* (*In re Kragness*), 63 B.R. 459, 464-65 (Bankr. D. Or. 1986) (holding that an alleged waiver of the right to a discharge with respect to an expectancy was "against public policy"); *Segal v. Rochelle*, 382 U.S. 375, 379-80 (1966) (dicta). Two earlier cases reached the opposite result. *Bridges v. Kedon*, 126 P. 149 (Cal. 1912); *Dumont, Roberts & Co. v. McDougal*, 200 Ill. App. 583 (1916). For early discussions, see 3 AMERICAN LAW OF PROPERTY, *supra* note 6, § 14.12, at 604 & n.73; Annotation, *Assignment of Expectancy or Inchoate Right Dependent on Future Conditions as a Lien Within the Provisions of the Bankruptcy Act Exempting Liens from the Operation of the Act*, 73 A.L.R. 1063 (1931); Note and Comment, 29 MICH. L. REV. 915 (1931).

62. 11 U.S.C. § 552(a) (1988) (emphasis added). The prior Bankruptcy Act contained no analogous provision. Cf. 11 U.S.C. § 522(e) & (f) (1988) (also rendering unenforceable waivers of rights to, and non-purchase money security interests in certain sorts of, exempt property in bankruptcy).

63. 11 U.S.C. § 541(a)(5) (1988).

tion 552(a) from the moment the debtor files her petition, rather than six months thereafter.

The one legitimate argument that might be salvaged out of Weinstein's commentary is that by permitting creditors to reach post-discharge expectancies they may be preserved from error costs in those instances where they failed to anticipate the possibility of a bankruptcy proceeding to protect the expectancy.<sup>64</sup> A similar rationale underlies the doctrine of promissory estoppel,<sup>65</sup> whereby promisees who fail to anticipate that a gratuitous promise might be broken, and who detrimentally rely thereon, are allowed to enforce the promise. While strict adherence to the principle that expectations follow from law would lead us to conclude that no promisee could ever reasonably rely on a promise unsupported by consideration, some promisees may nonetheless rely on unenforceable promises *by mistake*. The doctrine of promissory estoppel avoids their error costs, though only by sacrificing the perceived benefits of a rule requiring consideration as a prerequisite to the enforcement of promises.<sup>66</sup>

In the context of bankruptcy, by analogy, a creditor might detrimentally extend credit in reliance on the debtor's professed inheritance prospects, unmindful of the possibility that bankruptcy could

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64. In the same vein, Karl Llewellyn argued that because lay persons tend to follow social norms in their everyday dealings with the world, "legal certainty" from their standpoint can be achieved only by attuning legal rules to social conventions and expectations. KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 82-83 (Paul Gewirtz ed. & Michael Ansaldi trans., 1989) (1933).

65. For discussions, compare RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.1, at 95 (4th ed. 1992); Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 *HOFSTRA L. REV.* 443 (1987); Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 *FORDHAM L. REV.* 303, 311-16 (1992); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *YALE L.J.* 1261, 1301-09 (1980).

66. For discussions of these perceived benefits (and a fascinating debate it is), see P.S. ATIYAH, *PROMISES, MORALS, AND LAW* 212-15 (1981); MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 16-22 (1990); JOHN P. DAWSON, *GIFTS AND PROMISES: CONTINENTAL AND AMERICAN LAW COMPARED* 22, 93-96, 194-96, 199-201 (1980); CHARLES FRIED, *CONTRACT AS PROMISES* 28-39 (1981); David Cohen & Jack L. Knetsch, *Judicial Choice and Disparities Between Measures of Economic Values*, 30 *OSGOODE HALL L.J.* 737, 757-60 (1992); Melvin A. Eisenberg, *The Principles of Consideration*, 67 *CORNELL L. REV.* 640, 664-65 (1982); Melvin A. Eisenberg, *Donative Promises*, 47 *U. CHI. L. REV.* 1, 8-18, 31-33 (1979); Mary Louise Fellows, *Donative Promises Redux*, in *PROPERTY LAW AND LEGAL EDUCATION* 27 (Peter Hay & Michael H. Hoeflich eds., 1988); Lon L. Fuller, *Consideration and Form*, 41 *COLUM. L. REV.* 799, 820-24 (1941); Goetz & Scott, *supra* note 65, at 1300-01; Andrew Kull, *Reconsidering Gratuitous Promises*, 21 *J. LEGAL STUD.* 39, 40-46, 64-65 (1992); Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 *J. LEGAL STUD.* 411, 414-24 (1977); Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 *J. LEGAL STUD.* 401, 419-21 (1991).

intervene. Yet, as a response to this concern, the six-month window as presently crafted is both over- and underinclusive. It is overinclusive because many creditors, and certainly all commercial lenders, are perfectly familiar with the legal topography of the discharge—they take calculated risks and suffer statistically anticipated losses, not error costs.<sup>67</sup> And it is underinclusive because unsophisticated lenders (such as wage creditors and many trade creditors) who sometimes fail to allow for the possibility of bankruptcy, will presumably have relied on promises of payment from *all* sources, not just the expectancies netted by the six-month window. As presently cast, Section 541(a)(5) cannot perform the role played on the contract-law stage by promissory estoppel.

At any rate, importing the principle of promissory estoppel into bankruptcy law would contradict longstanding bankruptcy policy. In weighing avoidance of error costs against the perceived benefits of allowing debtors unconditional bankruptcy relief, the drafters of both the Act and Code saw greater virtues in the latter. In no respect has the discharge ever made special allowances for unsophisticated creditors' error costs.<sup>68</sup>

## B. Discharge Theory

Plainly, we must move beyond Weinstein's largely circular and unthematic analysis to a more fundamental question: As a substantive

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67. SULLIVAN ET AL., *supra* note 36, at 285; Hirsch, *supra* note 25, at 611 & nn. 124-25, 614 & n.136. According to the Restatement of Contracts, courts should award recovery for promissory estoppel "if injustice can be avoided only by enforcement of the promise," unlike the blanket coverage of § 541(a)(5). RESTATEMENT (SECOND) OF CONTRACTS § 90 (1965). See also Goetz & Scott, *supra* note 65, at 1306 n.107 (noting that when the promisee was aware of the promisor's legal right to break the promise, "reliance is likely to be characterized as unreasonable").

68. The Code does *not* permit creditors to rely on a debtor's promise to repay debts when they are ignorant or unmindful of the debtor's legal right to a discharge. In this respect, a plumber has no greater rights than American Express. Indeed, the Code even extends the discharge to debts owed to certain involuntary creditors, persons who had *no opportunity at all* to bargain with or deny credit to the debtor, such as tort victims. *But see* 11 U.S.C. § 523(a)(1), (5) & (6) (1988) (providing exceptions to the discharge for debts arising out of a tax or customs duty, for alimony, maintenance, or support payments, and for intentional tort claimants). Other areas of debtor-creditor law are similarly structured. Spendthrift trusts are effective against creditors, even when they relied on assets they erroneously believed to be owned by debtors out of trust. Courts have defended this rule on the ground that the error costs in such cases will (once again) be relatively small. *Nichols v. Eaton*, 91 U.S. 716, 726 (1875); *see Broadway Nat'l Bank v. Adams*, 133 Mass. 170, 173-74 (1882). *But see Utleigh v. Graves*, 258 F. Supp. 959, 960 (D.D.C. 1966) (holding that a spendthrift trust was subject to claims for alimony and maintenance), *rev'd sub nom. American Sec. & Trust Co. v. Utleigh*, 382 F.2d 451 (D.C. Cir. 1967).



issue of public policy, how broadly or narrowly should the discharge be framed? Once we arrive at an answer and pronounce it clearly, the problem of baffled expectations will, in large measure,<sup>69</sup> take care of itself. Which brings us to a second line of argument found in the legislative history of the Chandler Act, one offered by another prominent member of its drafting committee, Professor James Angell MacLachlan, who taught bankruptcy at the Harvard Law School.<sup>70</sup> Said MacLachlan:

This change would not go to the extent of striking at the elementary if logically false idea that the *spes successionis* [expectancy of inheritance] of an heir is not property at all. A more conservative step is taken in providing that where the bankrupt actually has a [future] property interest at the time of the petition, the trustee shall have the benefit of holding it during the administration in bankruptcy. To an extent this involves a departure from the strict theory of the date of cleavage, but the bankrupt ought not to get the benefit of all legal complications at the expense of creditors. *The vesting of such property is usually independent of the bankrupt's economic efforts and has no relation to his normal budget, so the usual reasons assigned for leaving him his after-acquired property do not apply.*<sup>71</sup>

These thoughts, which appeared next to Weinstein's in the legislative record,<sup>72</sup> were quoted verbatim from a critical review of the

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69. Except among unsophisticated creditors. Cf. *supra* notes 64-68 and accompanying text.

70. MacLachlan chaired the subcommittee that drafted the revised § 70, and he participated in drafting the Boston Draft at the first session of the National Bankruptcy Conference in 1932. The Story of the Draft, *supra* note 10, at 263-64. MacLachlan was one of three drafters of the final language of the six-month window as it appeared in the Chandler Act. See *supra* note 32. For a biographical sketch, see James Angell MacLachlan, HARV. L. SCH. BULL., May 1967, at 2-5.

71. ANALYSIS OF H.R. 12889, *supra* note 30, at 226 n.4 (emphasis added) (citations omitted).

72. Though Weinstein and MacLachlan each publicly advocated the six-month window and supported its adoption within the subcommittee of the National Bankruptcy Conference drafting the new § 70, it may be noted that the provision itself traced to neither of them. The first proposal for a six-month window appeared in a draft reform bill prepared in 1932 by the Committee on Legislation of the National Association of Referees in Bankruptcy. Neither Weinstein nor MacLachlan sat on that committee. *Amendments Considered Advisable by the Referees*, 7 J. NAT'L ASS'N REF. BANKR. 3, 17 (1932). The members of the committee are listed in *Association's Committees*, 6 J. NAT'L ASS'N REF. BANKR. 177 (1932). Subsequent drafts proposed by the National Bankruptcy Conference incorporated the six-month window and acknowledged the Referees' draft (while at the same time polishing its provision in a succession of technical linguistic revisions). Bankruptcy Act, Fourth General Bankruptcy Conference (second tentative draft) 101-02 & note (1933), in MacLachlan Papers, *supra* note 30, Paige Box 2; Bankruptcy Act, Fourth General Bankruptcy Conference (third tentative draft) 102 (1933), in MacLachlan Papers, *supra* note 30, Paige Box 2; The Story of the Draft, *supra* note 10, at 189 & note; H.R. 6439 Hearings, *supra* note 30, at 198. The draft bill produced by Weinstein himself on behalf of the Na-

Bankruptcy Act that MacLachlan had published in the *Harvard Law Review* over a decade before the 1938 reforms.<sup>73</sup> MacLachlan's proposal at that time had been to incorporate into the bankruptcy estate only the debtor's contingent future interests, not expectancies, and only those vesting during the administration of the bankruptcy proceeding, not those vesting thereafter.<sup>74</sup> A separate subsection geared toward reaching contingent future interests vesting within six months of bankruptcy was added alongside the one capturing expectancies under the Chandler Act,<sup>75</sup> and MacLachlan's commentary was cited, strictly speaking, only to support this separate provision.<sup>76</sup> But in another commentary on the Chandler Act, published while it was pending before Congress, MacLachlan left no doubt that he conceptualized the two policy problems as identical.<sup>77</sup> Apparently, MacLachlan had drawn back from a broader proposal in 1927 only because he was afraid it would appear too radical—whence his reference to the “elementary if logically false idea” that an expectancy is not property,<sup>78</sup>

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tional Association of Federal Practitioners in 1932 failed to include a six-month window or any other special provision for inheritances. *Draft of New Bankruptcy Bill*, 8 AM. BANKR. REV. 389, 448-49 (1932). For other early draft proposals that failed to address the issue, see *Full Text New Bankruptcy Bill*, *supra* note 20, at 260, 296-97 (unpassed Hastings-Michener bill); *Report of the Standing Committee on Commercial Law and Bankruptcy*, 57 A.B.A. REP. 408, 412-22 (1932) (A.B.A. draft); MacLachlan Papers, *supra* note 30, ms. box 1, folders 8-11; ms. box 2, folders 7-11 (Reuben Hunt draft, Harold Remington amendments, and other relevant papers). The Thatcher-Garrison Report, which suggested a different approach to the issue, is discussed *supra* note 20 and *infra* note 194.

73. James A. McLaughlin, *Amendment of the Bankruptcy Act*, 40 HARV. L. REV. 583, 610 (1927).

74. A proposal to that effect was first included in a list of proposed amendments to the Bankruptcy Act that MacLachlan had composed in 1926. He sent a copy of the draft amendments to Professor Williston for comment. Letter from James McLaughlin to Samuel Williston (Apr. 30, 1926), in MacLachlan Papers, *supra* note 30, ms. box 1, folder 2. (No reply is extant in the MacLachlan Papers.)

75. Bankruptcy Act § 70(a)(7) (previously codified at 11 U.S.C. § 110(a)(7)) (establishing a fixed six-month window for contingent interests in real property analogous to the one covering expectancies).

76. “With reference to contingent and executory interests, we again quote from the article by Prof. McLaughlin . . .” ANALYSIS OF H.R. 12889, *supra* note 30, at 226 n.4.

77. “Property acquired [by inheritance or survivorship] stands on a very different basis from the bankrupt's subsequent earnings. It is in the nature of a windfall having no relation to his normal budget. It seems unnecessary to the protection of the honest but unfortunate debtor to allow the spendthrift to obtain immunity in bankruptcy while his wealthy ancestor is on the death bed.” McLaughlin, *supra* note 29, at 380-81. This statement did not appear in the legislative history, however.

78. ANALYSIS OF H.R. 12889, *supra* note 30, at 226 n.4 (quoted *supra* text accompanying note 71). MacLachlan cited here (with, as the text suggests, disapproval) to three cases: an American case, *Bank of Elberton v. Swift* (*In re Swift*), 268 F. 305 (5th Cir. 1920); an English case holding that debtors could retain expectancies under wills that matured after they received their discharge, *Moth v. Frome*, 27 Eng. Rep. 262 (Ch. 1761); and another

and his characterization of his proposal to intervene only in those cases "where the bankrupt actually has a property interest at the time of the petition" as "[a] more conservative step."<sup>79</sup> MacLachlan's initial failure to extend his analysis from contingent interests to expectancies stemmed not from his perception of the problem, but from a vague and unreasoned inclination to legal conservation.

Assuming it applies to the six-month window, MacLachlan's commentary raises immediate questions about the consistency of the Code. If inheritances fall into the bankruptcy estate because they are "independent of the bankrupt's economic efforts,"<sup>80</sup> why are not postpetition gifts, or even lottery winnings, treated in the same way?<sup>81</sup> And why are creditors' rights to expectancies limited to those vesting within six months of bankruptcy? The argument, once again, might as easily be asserted to justify an indefinite extension of the date of cleavage.

This last point, at least, did not escape MacLachlan's attention, for he subsequently advocated precisely that concept in his bankruptcy treatise,<sup>82</sup> and other commentators have adopted a like stance.<sup>83</sup> As drawn up in 1978, the Bankruptcy Code took one step in

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English case holding expectancies to be unassignable, *In re Ellenborough*, 1 Ch. 697 (Ch. 1903).

79. ANALYSIS OF H.R. 12889, *supra* note 30, at 226 n.4 (quoted *supra* text accompanying note 71).

80. *Id.*

81. *See supra* note 23.

82. "There is no good reason why this innovation need be confined to such a brief period. . . . [I]t . . . represent[s] the minimum protection that should be afforded to the bankrupt[cy] estate. If this provision proves harmless, the question may arise in due course concerning the extent to which the estate may be given further protection by subsequent legislation." MACLACHLAN, *supra* note 20, at 179. MacLachlan cited approvingly to the English statute of 7 Geo. 4, ch. 57, § 11 (1826) (Eng.) (quoted *supra* note 20), capturing *all* contingent interests and expectancies for the bankruptcy estate. *Id.* at 179 n.4; *see also infra* note 85; McLaughlin, *supra* note 29, at 380-81 (describing the six-month window as a "very minor" extension of the trustee's title, and asserting the Bankruptcy Act's "extraordinary leniency" to debtors).

83. "In view of the analytical and economic similarities of transferable future interests and expectancies, it is awkward to explain on any basis why the trustee gets the first and not the second." 4A COLLIER, *supra* note 5, § 70.37, at 459 n.14. Professor Vern Countryman took the same position, arguing that anything of value, including expectancies of inheritance, should fall into the bankruptcy estate. Countryman added that any type of property deemed necessary for the debtor's rehabilitation could then be classified as exempt, but there is no indication that he viewed inheritances in this light. He characterized the six-month window as "generous" to debtors. Countryman, *The Use of State Law*, *supra* note 22, at 444-45, 473-75. Countryman's position on this issue (though unfortunately wanting of substantive analysis) is intriguing, given that his corpus of scholarship is hardly notable for its solicitude to the interests of creditors. *See, e.g.*, Vern Countryman, *Bankruptcy and the Individual Debtor—and a Modest Proposal to Return to the Seventeenth*

this direction, though not two. Whereas the Chandler Act treated contingent interests and expectancies alike, funneling both into the bankruptcy estate if they vested within six months of the petition, the Code now reserves contingent interests for the estate regardless of when they ultimately vest.<sup>84</sup> The six-month window for expectancies continues as before, however, for reasons that may have more to do with tradition than with reasoned policy.<sup>85</sup>

But before we hurry to the conclusion that all expectancies should be amalgamated with contingencies and treated as property of

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*Century*, 32 CATH. U. L. REV. 809 (1983) [hereinafter Countryman, *Bankruptcy and the Individual Debtor*]. For related proposals to give bankruptcy courts discretionary power to suspend the discharge, see *supra* note 20 and *infra* note 194.

84. See *supra* note 13.

85. As MacLachlan told the story,

It is accepted as unquestioned dogma having an ancient historical basis that the expectancy of an heir to inherit from his ancestor is not a property right, and will not pass to the trustee. . . . Arguments on such a question tend to involve metaphysical distinctions about the inherent nature of different legal rights. Such distinctions often leave the modern mind cold. If they are of any assistance in determining what the law is, they are of no assistance in determining what the law ought to be. Any attempt to amend the Bankruptcy Act to operate in more pragmatic terms, however, would be an attempt to storm the citadels of professional conservatism where their front seems most impregnable. A modest flanking movement was initiated in 1938 [with the Chandler Act], however . . .

MACLACHLAN, *supra* note 20, at 178-79; see also 3 REMINGTON, *supra* note 13, § 1217, at 62 (characterizing the six-month period as "purely artificial"). According to MacLachlan, the one reasoned justification for a six-month limit was administrative convenience: "Six months was chosen because the Bankruptcy Act contemplates, in asset cases, a minimum of something over six months for administration . . . and any period much more extended might appear to countenance a dilatory administration in bankruptcy, which is contrary to the policy of the act." MACLACHLAN, *supra* note 20, at 179; see also *supra* note 74 and accompanying text detailing his original proposal, which called for a window limited to the term necessary to administer the estate. Cf. Adler, *supra* note 7, at 433-34 (claiming that in consumer bankruptcy cases administration "often is closed . . . long before" the passage of six months). This rationale, however, fails to withstand analysis. The only reason to expedite administration in bankruptcy is to minimize the cost to *creditors*. If creditors find it in their interest to hold an estate open and are willing to bear the cost, then there is no public policy against their doing so. See Countryman, *The Use of State Law*, *supra* note 22, at 474 (suggesting that bankruptcy estates include anything of value, and "[i]f the trustee then finds that there is no effective way he can sell . . . [it] without delaying the closing of the estate he can abandon it"); Vern Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS L. REV. 678, 701-03 (1960) (noting that if it is efficient to do so, a bankruptcy trustee can hold open an estate to capture spendthrift trust income that creditors would be entitled to reach under state law) [hereinafter Countryman, *For a New Exemption Policy*]. In fact, trustees have traditionally been empowered to hold estates open indefinitely if that is in the interest of creditors. E.g., *In re Brown*, 94 F. Supp. 259, 263 (N.D.N.Y. 1950) (permitting a trustee to hold an estate open for fourteen years while waiting for contingent interest to vest); *In re Meyers*, 139 B.R. 858, 860, 862 (Bankr. N.D. Ohio 1992) (permitting a trustee to hold an estate open for thirteen years while awaiting proceeds from a lottery ticket).

the estate under the Bankruptcy Code, let us reflect a bit on the merits of the case. Does MacLachlan's argument stand up to analysis? Before we can answer this question, we must first address a more fundamental question: *viz.*, what is the discharge supposed to accomplish for society? Only after we pin down (if that is possible<sup>86</sup>) the policies underlying the discharge can we proceed to consider whether inclusion of expectancies in the bankruptcy estate conforms or conflicts with those policies.

The discharge has given rise to a lively debate in recent years, a debate made all the more intriguing by the subject's many-sidedness. The idea of the fresh start can be probed from half a hundred different pedagogical angles, including history,<sup>87</sup> political theory,<sup>88</sup> contract

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86. Compare Lord Macnaghten on the rule in *Shelley's Case*: "[I]t is one thing to put a case like *Shelley's* in a nutshell and another to keep it there." *Van Grutten v. Foxwell*, 1897 App. Cas. 658, 671.

87. The discharge was originally developed in Great Britain primarily as a device to encourage debtors to disclose assets they had fraudulently concealed. 4 Anne ch. 17, preamble, §§ 1, 7, 17, 18 (1705) (Eng.); 10 Anne ch. 15 (1711) (Eng.); MacLACHLAN, *supra* note 20, at 20-21, 88; see also Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 18-20 (1919). This aim also appeared in early American bankruptcy legislation, and it remains an acknowledged element of the discharge to this day. PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA* 12-13, 45, 270-71 (1974); *United States v. Kras*, 409 U.S. 434, 447 (1973); *Guardian Indus. Prods. v. Diodati (In re Diodati)*, 9 B.R. 804, 809 (Bankr. D. Mass. 1981); *WTHW Inv. Builders v. Dias (In re Dias)*, 95 B.R. 419, 421 (Bankr. N.D. Tex. 1988); see 11 U.S.C. § 727(a)(2)-(6) (1988) (denying discharge to uncooperative debtors). See generally CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* (1935); Countryman, *Bankruptcy and the Individual Debtor*, *supra* note 83, at 809-18; John C. McCoid II, *The Origins of Voluntary Bankruptcy*, 5 BANKR. DEV. J. 361 (1988). For ancient antecedents of the discharge, see Max Radin, *The Nature of Bankruptcy*, 89 U. PA. L. REV. 1, 6 (1940); Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 53 n.11 (1986); see also Louis E. Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 225 (1918).

88. Early republican theorists feared that debt threatened the survival of a republic because, as a lure to luxury and extravagance, it debased the "virtue" of its citizens and made them subservient to creditors who were potential tyrants. In addition, some theorists feared that a vibrant market for credit would push the United States toward commercialization and away from the agrarian economy they considered essential ballast for a republic. Thomas Jefferson (who never got out of debt himself) thus urged legal reforms to make credit less attractive, and he stood opposed to federal bankruptcy legislation. EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* 383-84 (1975); MCCOY, *supra* note 4, at 178-84; Letter from Thomas Jefferson to Thomas Pleasant (May 8, 1786), in 9 PAPERS OF THOMAS JEFFERSON 473 (Julian P. Boyd ed., 1950); Letter from Thomas Jefferson to Archibald Stuart (Jan. 25, 1786), in *id.* at 218; 17 THE WRITINGS OF THOMAS JEFFERSON 331-33 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 416-18 (1969); see also Garry Wills, *The Aesthete*, 40 N.Y. REV. BOOKS, Aug. 12, 1993, at 6, 6 (discussing Jefferson's personal debt problems). Like many aspects of American republican ideology, these concerns had English roots. See Paul H. Haagen, *Imprisonment for Debt in England and*

theory,<sup>89</sup> natural law,<sup>90</sup> libertarian philosophy<sup>91</sup> (and its mirror image,

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Wales 108-12 (1986) (unpublished Ph.D. dissertation, Princeton University). And its ideological branches extend to the present: Special provisions for farmers under the Bankruptcy Code are a political vestige of the republican glorification of agrarianism. See David Ray Papke, *Rhetoric and Retrenchment: Agrarian Ideology and American Bankruptcy Law*, 54 MO. L. REV. 871 (1989).

In another variation on this theme, some theorists feared that debtors facing stringent debtor-creditor laws would be driven to revolt against the state, a prophecy fulfilled in post-revolutionary Massachusetts. 2 WILLIAM BLACKSTONE, COMMENTARIES \*472-73; for an early discussion, see PLATO, THE COLLECTED DIALOGUES OF PLATO 784 (E. Hamilton & H. Cairns eds., 1961); on debtor revolt, see ROBERT A. FEER, SHAYS'S REBELLION (1988). From this political perspective, however, the discharge appears double-edged. On the one hand, it encourages persons to get into debt and thus tends to promote commercial speculation. On the other hand, the discharge provides an escape route from debt and therefore could be viewed as a means of defusing the political threat of widespread debtor subservience or unrest. The continued relevance of these early political concerns is, at any rate, dubious in the latter-day republic, with its stronger state apparatus. One modern bankruptcy court has offered a different political rationale for the discharge, turning agrarian republicanism on its head: Were each citizen restricted to "only one economic life," then the threat of a single economic failure "would frustrate and still the creative spirit which lies at the heart of our democratic society." *In re Bruno*, 68 B.R. 101, 103 (Bankr. W.D. Mo. 1986); similarly, see Polygram Distribution Inc. v. B.A. Sys., Inc. (*In re Burstein-Applebee Co.*), 63 B.R. 1011, 1019 (Bankr. W.D. Mo. 1986) (asserting that absent the "industry and creativity" preserved by the discharge "the predicate upon which our democratic institutions exist would stand in grave peril"); *Chillicothe State Bank v. Carroll* (*In re Carroll*), 70 B.R. 143, 145 (Bankr. W.D. Mo. 1986) (asserting that the discharge is fundamental "to the preservation of . . . our national strength").

89. The discharge has been conceived as equivalent to a doctrine of impossibility covering contracts for credit. This is not the whole story of the discharge, since it—unlike doctrines of contract excuse—cannot be waived or modified by the parties. But, were the discharge simply conceived as a default rule built into the contract for credit, its utility as a means of efficiently assigning risk of impossibility would be unclear. Pertinent considerations include: (1) the relative ability of debtor and creditor to bear (or insure against) the risk, (2) the relative abilities of the parties to control the risk, (3) the assignee of risk most bargaining parties would agree upon (which, if presumed, can avoid transaction costs), and (4) the relative knowledge (or cost of information) of the parties concerning the extent of the risk. For discussions in connection with bankruptcy, see POSNER, *supra* note 65, § 14.4, at 402; Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 981-83 (1981) [hereinafter Eisenberg, *Bankruptcy Law*]; Robert A. Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 STAN. L. REV. 99 (1990); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1063-68 (1987); JACKSON, *supra* note 25, at 228-30; Samuel A. Rea, Jr., *Arm-Breaking, Consumer Credit and Personal Bankruptcy*, 22 ECON. INQUIRY 188, 191-92 (1984); John C. Weistart, *The Costs of Bankruptcy*, 41 L. & CONTEMP. PROBS., Autumn 1977, at 107, 111-12. For relevant contract law discussions, see POSNER, *supra* note 65, §§ 4.1, 4.5; Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978); Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

90. Were the debtor to remain indefinitely in bankruptcy without a discharge, she would lose her right to enjoy income or to sue for personal wrongs, except for the benefit of the bankruptcy estate. Some have suggested that this state of affairs would leave the

debtor "an outlaw, a mere slave to the trustee," which is contrary to natural justice. *Ex parte Vine* (*In re Wilson*), 8 Ch. D. 364, 366 (Eng. C.A. 1878); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 189 (1980); HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 93 (4th ed. 1919) (1891); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 5-6 (1833). In a less quoted passage from the leading American opinion on the discharge, Justice Sutherland similarly characterized the debtor's earning power as "in the nature of a personal liberty quite as much as, if not more than, it is a property right." *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934); *see also* Boshkoff, *supra* note 20, at 112-13 & n.169 (characterizing 1932 proposal to restrict the discharge condemned as "absolutely out of step with our conception of liberty"); *Uniform System of Bankruptcy: Joint Hearings on S. 3866 Before the Subcomm. on S. 3866 of the Senate Comm. on the Judiciary and the Subcomm. on Bankruptcy Legislation of House Comm. on the Judiciary*, 73d Cong., 1st Sess. 546, 641, 743 (1932) ("UnAmerican"); MACLACHLAN, *supra* note 20, § 122, at 113 (reporting National Bankruptcy Conference opposition to suspended discharge as "semi-peonage"); *Farmer's and Merchant's Bank v. Jones* (*In re Jones*), 67 B.R. 484, 487 (Bankr. W.D. Mo. 1985) (suggesting that without a discharge "the great indebtedness owed by the debtors would make life nearly impossible for them"); *Carroll*, 70 B.R. at 145 (asserting that the discharge is "vital . . . to the preservation of the concept and practice of individual freedom"). More recently, critics have characterized proposals to abolish consumer bankruptcy liquidation and offer discharge only in connection with a Chapter 13 "wage earner" plan as contrary to the spirit of the other "13"—the Thirteenth Amendment. Countryman, *Bankruptcy and the Individual Debtor*, *supra* note 83, at 826-27; Steven L. Harris, *A Reply to Theodore Eisenberg's Bankruptcy Law in Perspective*, 30 UCLA L. REV. 327, 348-49, 360-61 (1982). For criticism of existing limitations of Chapter 7 relief on this basis, *see* Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 69-70, 85 (1986) (hereinafter Gross, *Fresh Start*); Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165 (1990). But rejecting this analogy, *see* Eisenberg, *Bankruptcy Law*, *supra* note 89, at 988-89; Theodore Eisenberg, *Bankruptcy Law in Perspective: A Rejoinder*, 30 UCLA L. REV. 617, 635-36 (1983) [hereinafter Eisenberg, *A Rejoinder*]; Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1405 n.38 (1985). For a recent opinion rejecting a constitutional challenge to its power (per § 707(b)) to refuse to grant relief under Chapter 7, *see In re Higginbotham*, 111 B.R. 955, 967 (Bankr. N.D. Okla. 1990). *But cf. In re Molina Y Vedia*, 150 B.R. 393, 398-400 (Bankr. S.D. Tex. 1992) (construing the discharge as embodied in § 541 in light of congressional intent to avoid any potential conflict with the Thirteenth Amendment).

91. Denying debtors the right to waive the discharge *ex ante* arguably violates their autonomy. Such autonomy may be grounded on utilitarian ideology (assuming that individuals are the best judges of their own interests), on transcendental philosophy (assuming that self-reliance and individual responsibility are morally compelled), or on existential philosophy (assuming that the making of choices is an essential aspect of the human condition). 2 RALPH WALDO EMERSON, *Self-Reliance*, in *THE COLLECTED WORKS OF RALPH WALDO EMERSON* 25 (Joseph Slater ed., 1979); MARTIN HEIDEGGER, *BEING AND TIME* 157-59 (John Macquarrie & Edward Robinson trans., 1962) (1927); JOHN STUART MILL, *ON LIBERTY* 68-69, 141-43 (Gertrude Himmelfarb ed., Penguin Classics 1985) (1859). For an early defense of autonomy in connection with debt, *see* Coleman, *supra* note 87, at 181 (quoting a South Carolinian commentator); and more recently, JOHN C. GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* at iii-v (2d ed. 1895). On the other hand, if theorists are justified in describing hopeless insolvency as a form of slavery, *see supra* note 90, then it becomes possible to compare waiver of the discharge to subjection to the risk of slavery. The right of voluntary consent to slavery is controversial, even within libertarian

paternalism<sup>92</sup>), moral philosophy,<sup>93</sup> distributive ethics,<sup>94</sup> cultural an-

theory, because it is a right that simultaneously upholds *and undermines* personal autonomy. GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 128-29 (1988); DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* (1989); MILL, *supra*, at 172-73; Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763, 774-86 (1983); Donald H. Regan, *Justifications for Paternalism*, in *THE LIMITS OF LAW: NOMOS XV*, at 189, 192-201 (J. Roland Pennock & John W. Chapman eds., 1974). For early discussions, compare THOMAS HOBBS, *LEVIATHAN* 255-56 (C.B. Macpherson ed., Penguin 1968) (1651); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. 2, § 23, at 284 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). For discussions specifically in connection with bankruptcy, compare SIDGWICK, *supra* note 90, at 91-93; Kronman, *supra*, at 785-86; and JACKSON, *supra* note 25, at 233-34.

92. Making the discharge nonwaivable could be justified as a paternalistic move: protecting those persons who are prone to reckless borrowing from their own poor judgment and the subsequent "regret" they would otherwise experience. That a significant class of irrational borrowers exists is evident. See *infra* note 97. Though denying the equation of insolvency and slavery, Professor Jackson argues that a nonwaivable right of discharge can still be reconciled with libertarianism—that is, can be conceptualized as *not* paternalistic—if we find that debtors (like Ulysses) recognize in themselves a susceptibility to some irrational temptation (here, to waive the discharge) and *wish* to prevent themselves *ex ante* from succumbing to it. Such an act of "self-paternalism," since it is self-imposed, accords with individual autonomy. JACKSON, *supra* note 25, at 234-35, 240-41 & n.43; GORDON TULLOCK, *THE LOGIC OF THE LAW* 56 (2d ed. 1987). See generally JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 36-111 (1979). There is, however, no reported empirical evidence of such a recognition and widespread political preference in connection with contracts for credit. Thus, characterization of the nonwaivable right of discharge as self-paternalistic is problematic. See Jon Elster, *Selfishness and Altruism*, in *BEYOND SELF-INTEREST* 44, 47 (Jane J. Mansbridge ed., 1990) ("Giving food stamps instead of money is an example [of paternalism]. If the recipient had voted for this mode of transfer it would be an unobjectionable form of self-paternalism, but that is not how these decisions are made. They are taken by the welfare bureaucracy.")

Professor Jackson also argues that nonwaivability is not paternal because, irrespective of current popular preferences, awareness of the temptation to waive the discharge and a consequent move for nonwaivability "accords with the result of a hypothetical initial deliberation behind a Rawlsian 'veil of ignorance.'" JACKSON, *supra* note 25, at 236-37, 241. This argument appears too clever by half. To suggest that persons who *fail* to perceive what is in their interest *could* perceive it if they engaged in a Rawlsian *gedanken* experiment does not alter the fact that they do *not* perceive it, and that others are accordingly acting on their behalf. Indeed, that is part and parcel of the concept of paternalism! If subjects *would not* perceive outside intervention to be in their best interest if in possession of hypothetically perfect information, then the central moral justification for paternalistic intervention—namely, that the paternalist spares the subject from regret—would disappear. See Regan, *supra* note 91, at 190-92. Rawlsian theory provides a justification for the division of rights, by asking what rights persons would create before they knew their status (as, say, a debtor or a creditor). It does not offer a way around the dilemma of paternalism.

93. See *infra* notes 164-171 and accompanying text.

94. Because creditors demand an interest rate that will allow them to profit in the aggregate, despite incidental debtor bankruptcies, the discharge produces a wealth transfer from those debtors who avoid bankruptcy to those who succumb to it. Richard Posner has described this transfer as a subsidy from the "prudent" to the "feckless," "a curious basis on which to redistribute wealth!" POSNER, *supra* note 65, § 14.4, at 402; see also Eisenberg,



thropology,<sup>95</sup> behavioral psychology,<sup>96</sup> even cognition and sociobiology.<sup>97</sup> But the conventional justification for the discharge, articulated most famously (though hardly originally) in the *Local*

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*Bankruptcy Law*, *supra* note 89, at 983. But the discharge can also be viewed as a form of insurance against insolvency, in which capacity it redistributes wealth from the fortunate to the unlucky—a less ethically troubling proposition. Part of the cost of the discharge may also be borne by creditors and by society at large. Howard, *supra* note 89, at 1065-68.

95. Bankruptcy, and the discharge that culminates it, can be viewed as classic sort of ostracism-cum-reinstatement ritual. For an example drawn from native American society, see KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* 9-12 (1941). The breaking of the bench was the original cultural ritual signaling the debtor's ostracism (and giving bankruptcy its name). Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189, 189-90 & n.2 (1938). On the historical stigma of bankruptcy, see, for example, Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, reprinted in 39 GREAT BOOKS OF THE WESTERN WORLD 1, 148 (Robert M. Hutchins ed., 1952) (1776); for a modern discussion, see McIntyre, *supra* note 41, at 128-33; see also *Perry v. Commerce Loan Co.*, 383 U.S. 392, 395 (1966) (acknowledging historical stigma). While the modern American Bankruptcy Code has sought to erase this stigma, individual creditors have striven to perpetuate it. For a modern equivalent of the broken bench of old, see *Turner Advertising Co. v. National Serv. Corp.* (*In re National Serv. Corp.*), 742 F.2d 859, 860 (5th Cir. 1984) (creditor advertised debtor's bankruptcy on billboards). The discharge proceeding, though discretionary since 1986, remains ritualized to this day. 11 U.S.C. § 524(d) (1988). For a defense of the ritual aspect of bankruptcy, see Ferdinand F. Stone, *A Primer on Bankruptcy*, 16 TUL. L. REV. 339, 354, 361 (1942).

96. The discharge arguably functions to relieve the psychological trauma of financial calamity, along with its common symptoms (depression, alcohol abuse, marital difficulty, etc.). H.R. DOC. NO. 137, *supra* note 22, pt. 1, at 53; Hallinan, *supra* note 87, at 73; G. Stanley Joslin, *The Philosophy of Bankruptcy—a Re-Examination*, 17 U. FLA. L. REV. 189, 193 (1964); Kronman, *supra* note 91, at 785-86; see, e.g., *Everett v. Judson*, 228 U.S. 474 (1913) (debtor committed suicide); see also DAVID CAPLOVITZ, *CONSUMERS IN TROUBLE* 273-89 (1974) (empirical study of the symptoms of debt); Lawrence M. Ginsburg & Sybil A. Ginsburg, *A Psychoanalytic View of Personal Bankruptcy*, in *THE LAST TABOO: MONEY AS SYMBOL AND REALITY IN PSYCHOTHERAPY AND PSYCHOANALYSIS* 70 (1986) (case study of the symptoms of debt). But the psychological impact of a bankruptcy proceeding (which by tradition incorporates no psychological counseling) may not be unambiguously salutary. STANLEY & GIRTH, *supra* note 36, at 65-69; Howard, *supra* note 89, at 1060-61; Philip Shuchman, *Theory and Reality in Bankruptcy: The Spherical Chicken*, 41 LAW & CONTEMP. PROBS., Autumn 1977, at 66, 88-89.

97. Professor Jackson has argued that certain cognitive processes predispose persons to act impulsively and to underestimate risk, thereby leading them "systematically" to overconsume credit. These disabilities can serve to justify state intervention to prevent persons from irrationally waiving their right to a discharge. JACKSON, *supra* note 25, at 228-43; see also Hallinan, *supra* note 87, at 109-18. But see *In re Goodson*, 130 B.R. 897, 903 (Bankr. N.D. Okla. 1991) (pointing to debtor's lack of self-control as a ground for denying bankruptcy relief). A number of responses are in order. First, processes of cognition may operate systematically, but they do not tend uniformly toward the overconsumption of credit: For example, the empirically verified phenomenon of risk aversion also affects social behavior. This psychological cross-current could just as easily incline persons toward conservative borrowing. On the psychology of risk aversion, see Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 31 n.117 (1992); cf. JACKSON, *supra* note 25, at 239-40 (downplaying risk aversion).

*Loan case*,<sup>98</sup> proceeds from the direction of economics. Put simply, the discharge functions to avoid the social costs of insolvency. Without the discharge, a hopelessly insolvent debtor would lose her incentive to produce, preferring instead to consume leisure, and administratively costly welfare benefits.<sup>99</sup> By restoring the debtor to

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Second, to the extent that some persons today are prone to over-borrow, this prudence may well be partly (I dare say, largely) *cultural* in nature—a sequela to the rise of a consumerist ethic that cherishes material possessions and encourages persons to favor present over future consumption, coupled with the concurrent development of modern marketing. These cultural attributes are notorious. See, e.g., DANIEL HOROWITZ, *THE MORALITY OF SPENDING* (1985); OLNEY, *supra* note 35, at 118-84; VANCE PACKARD, *THE HIDDEN PERSUADERS* (1957); ROBERT B. SETTLE & PAMELA L. ALRECK, *WHY THEY BUY* 221-43 (1986); DAVID M. TUCKER, *THE DECLINE OF THRIFT IN AMERICA* (1991). For skeptics of sociobiological explanations of human behavior (e.g., Stephen Jay Gould, *Cardboard Darwinism*, N.Y. REV. BOOKS, Sept. 25, 1986, at 47, reprinted in STEPHEN J. GOULD, *AN URCHIN IN THE STORM* 26 (1987)), these aspects of our culture suggest an additional explanation for observed patterns. For early discussions in connection with bankruptcy, see Walter D. Coles, *The Solicitor General's Bankruptcy Report and New Bankruptcy Bill*, 18 A.B.A. J. 293, 293-94 (1932) (describing the rise of consumerism as a cause of insolvency, but also characterizing debtors as "honest optimists"); Douglas, *supra* note 20, at 348-50 (citing "seductive" sales techniques and "excessive optimism"); see also Hallinan, *supra* note 87, at 67-68, 77-78; cf. *id.* at 81-82.

Third, whatever its organic and/or environmental origins, the existence of an identifiable class of "credit card junkies" has now been confirmed empirically. SULLIVAN ET AL., *supra* note 36, at 184-90. But if the discharge does function to protect these persons from their own bad judgment, one may observe that it is merely a palliative remedy, for it makes no effort to cure their behavioral tendencies. Debtor education has long been urged by other commentators, and Jackson's analysis could be applied to underscore its importance, but it has never been incorporated into formal bankruptcy process. H.R. Doc. No. 137, *supra* note 22, pt. 2, at 52-53; NATIONAL COMMISSION, *supra* note 36, at 193-200; Hallinan, *supra* note 87, at 78-80, 133-34; Howard, *supra* note 89, at 1060; cf. Hallinan, *supra* note 87, at 134-35; JACKSON, *supra* note 25, at 239-40 (questioning the capability and cost-effectiveness of debtor education); but see James A. MacLachlan, *Puritanical Therapy for Wage Earners*, 68 COM. L.J. 87, 89 (1963) (arguing that a Chapter 13 proceeding is itself salutary, in that it "can contribute substantially to the elementary business education of many debtors"); Jack L. Van Baalen, *Bankruptcy Code Chapter 13—What Price the "Better Discharge"?*, 35 OKLA. L. REV. 455, 485-86 (1982) (same). A conclusion that propensities to over-borrowing are linked to genetics would not imply that educational efforts will prove ineffectual. Even sociobiologists reject the notion of biological determinism. See Peter Singer, *Ethics and Sociobiology*, 11 PHIL. & PUB. AFF. 40, 61 (1982).

Finally, a mandatory rule overriding irrational undervaluation of the discharge, standing alone, will not work unequivocally to the advantage of debtors, because that same undervaluation may irrationally drive down demand for credit once its price is adjusted to reflect the actual cost of the discharge. For an economic analysis, see Rea, *supra* note 89, at 189-91.

98. *Local Loan Co. v. Hunt*, 292 U.S. 234, 242-43 (1934).

99. In some reported cases insolvent debtors quit their jobs. E.g., *In re Keebler*, 106 B.R. 662 (Bankr. D. Haw. 1989); see also *In re Graham*, 21 B.R. 235, 238-39 (Bankr. N.D. Iowa 1982) (recognizing the danger that debtors denied a discharge would cease employment). (Subjection to wage garnishment also often resulted historically in *involuntary* loss of employment, but such action by employers is illegal under modern federal and state

solvency, the discharge simultaneously removes the debtor's incentive to rely on inefficient state aid and renews her incentive to contribute to the gross national product.<sup>100</sup> In this respect, the utility of the discharge is not unequivocal, for it has a second economic edge<sup>101</sup>: As a form of insurance against insolvency, the discharge creates incentives

legislation. See 15 U.S.C. § 1674 (1988 & Supp. V 1993).) An analogy can be drawn here to the economic theory of taxation. Like taxes, indebtedness reduces one's net return from labor, though the consequence of that reduction is unclear. One may be stimulated to *greater* labor to make up for the tax (the "wealth effect"), or one may be stimulated to substitute leisure for labor because, as a valuable good, leisure is now relatively less costly (the "price effect"). In the case of hopeless insolvency—like confiscatory taxation—the price effect swamps the wealth effect. See WALTER J. BLUM & HARRY KALVEN, JR., *THE UNEASY CASE FOR PROGRESSIVE TAXATION* 21-23 (1953). Still, to the extent persons enjoy their jobs, or are simply *habituated* to a work routine, their productivity may not suffer (or suffer as badly as we would expect) in the event of insolvency. See Arthur A. Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 15 & n.42 (1970) (discussing wage garnishment). See generally *THE NATURE OF WORK: SOCIOLOGICAL PERSPECTIVES* (Kai Erikson & Steven P. Vallas eds., 1990); ROBERT E. LANE, *THE MARKET EXPERIENCE* 235-422 (1991); F. Thomas Juster, *Preferences for Work and Leisure, in TIME, GOODS, AND WELL-BEING* 333 (F. Thomas Juster & Frank P. Stafford eds., 1985); Curt Tausky, *Work is Desirable/Loathsome: Marx Versus Freud*, 19 WORK & OCCUPATIONS 3 (1992).

100. In the classic language of Justice Sutherland, the discharge provides debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan*, 292 U.S. at 244; for analogous statements see, for example, *UNIFORM SYSTEM OF BANKRUPTCY*, H.R. REP. NO. 65, 55th Cong., 2d Sess. 32 (1897); H.R. DOC. NO. 137, *supra* note 22, pt. 2, at 71, 68-74; MACLACHLAN, *supra* note 20, at 88; see also FRIED, *supra* note 66, at 108-09 (1981) (emphasizing avoidance of the need for social welfare assistance); POSNER, *supra* note 65, § 14.4, at 402 (noting as a social cost of discharge denial the extended intervention by the judicial system required to supervise a gradual repayment plan). For earlier expressions of this rationale see, for example, 2 BLACKSTONE, *supra* note 88, at \*483-84; COLEMAN, *supra* note 87, at 271; MCCOY, *supra* note 4, at 180; SIDGWICK, *supra* note 90, at 93; 3 STORY, *supra* note 90, at 5-6; WARREN, *supra* note 87, at 159; Hallinan, *supra* note 87, at 57 n.24, 66 n.69; Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 554-55 (1915) (and earlier cases cited therein); *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918) (and earlier cases cited therein). Such rhetoric had roots in prior condemnations of imprisonment for debt. On this antecedent strain of ideology, see DONALD VEALL, *THE POPULAR MOVEMENT FOR LAW REFORM 1640-1660*, at 145-51 (1970); COLEMAN, *supra* note 87, at 250, 271; see also Jay Cohen, *The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153 (1982). Still another branch of this rhetoric has grown up to support the extension of poor relief. 2 JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* bk. 5, ch. 11, § 13, at 468-69 (The Colonial Press rev. ed. 1899) (1848).

101. And a third one: for one must also consider the impact of the discharge on *creditors*, who are thereby denied satisfaction of their debts. Such denial may render some creditors dependent on state support, which again entails social costs. The Bankruptcy Code operates to blunt this edge of the discharge, however, by excepting from its coverage certain creditors who would otherwise likely fall into this category. Thus, alimony and child support obligations are *not* discharged in bankruptcy. 11 U.S.C. § 523(a)(5) (1988). On the other hand, *all* creditors who suffer bad debt losses as a result of the discharge pass

for individuals to risk higher loads of debt.<sup>102</sup> But the marginal significance of this "moral hazard"<sup>103</sup> is probably small, for absent the discharge insolvent debtors would *still* be substantially judgment-proof (and potentially eligible for state welfare), a circumstance creating similar incentives for reckless borrowing.<sup>104</sup>

The bar on *ex ante* waivers of the right of discharge also follows from this economic theory. Because the social costs of insolvency are external to the contract for credit, the bargaining parties would not bear the full cost of an agreement to foreclose the fresh start.<sup>105</sup> At

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part of them on to society, *inter alia*, by deducting them from their taxable income. STANLEY & GIRTH, *supra* note 36, at 37-39.

102. POSNER, *supra* note 65, § 14.4, at 402; Hallinan, *supra* note 87, at 83-84, 98-109; Weistart, *supra* note 89, at 110. This criticism is an old one. 2 BLACKSTONE, *supra* note 88, at \*473; COLEMAN, *supra* note 87, at 181, 273-74, 281; MCCOY, *supra* note 4, at 183-84; HENRY SIDGWICK, THE PRINCIPLES OF POLITICAL ECONOMY 430 (3d ed. 1901) (1883); Hallinan, *supra* note 87, at 67 n.73. *But cf.* BAIRD, *supra* note 55, at 33-34 (noting that the moral hazard here is small, given the other costs to the debtor of reckless borrowing).

103. On this problem, which arises in connection with all forms of insurance, see Mark V. Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531, 531-35 (1968); Kenneth J. Arrow, *The Economics of Moral Hazard: Further Comment*, 58 AM. ECON. REV. 537 (1968).

104. Hirsch, *supra* note 25, at 619. The incentive to recklessness created by *stringent* insolvency laws was noticed early. COLEMAN, *supra* note 87, at 281-82; for a recent recapitulation, see Joslin, *supra* note 96, at 193. Compare Professor Jackson's argument that a right of discharge operates to *mitigate* the moral hazard of borrowing. According to Jackson, the discharge shifts "the risk of ill-advised credit decisions" from social insurance to creditors, who are better able to monitor debtors and thereby to check their propensities to over-consume credit. JACKSON, *supra*, note 25, at 230-31. The difficulty with this analysis is that, even in the *absence* of a discharge, creditors still bear the *private cost* of a default. It is only the *social cost* of default (cessation of labor, etc.) that falls on society, and this does not shift to creditors if the discharge is available—it simply disappears, given the debtor's renewed incentive to productivity. Because creditors must suffer the private cost of a default irrespective of whether the right to a discharge exists, they will monitor debtors to avoid over-borrowing under *either* hypothetical legal regime. And if a discharge raises incentives to over-borrowing above the level that would exist without it, as it is bound marginally to do, then private costs (in terms of monitoring plus defaults not efficiently preventable) must accordingly rise. Of course, social costs will simultaneously fall—that is the cutting edge of this legal sword—but not as a result of a shift in the risk of default.

105. The point is hinted at in *Local Loan*:

This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest . . . .

. . . To preserve [the] free exercise [of the power to earn a living] is of the utmost importance . . . because it is a matter of great public concern. From the viewpoint of the wage earner there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either.

*Local Loan*, 292 U.S. at 244-45. For a further elaboration, see Hallinan, *supra* note 87, at 118-32; JACKSON, *supra* note 25, at 230-32, 243-48, 256-57; Weistart, *supra* note 89, at 111. Avoiding external costs in order to achieve efficiency is a classic justification for contract

the same time, the parties are not significantly injured by the loss of this opportunity, for an *ex ante* waiver is of marginal value to lenders: If prevented from seeking a discharge, an insolvent debtor could still stymie her creditors by ceasing to produce property against which they could levy. Hence, by mandating an unwaivable right of discharge, lawmakers avoid external costs *without* significantly distorting the cost of credit.<sup>106</sup>

Now, how does MacLachlan's policy analysis fit into this economic model of discharge? The nub of the argument is the hypothesis that expectancies are ordinarily "independent of the debtor's economic efforts."<sup>107</sup> If this assertion were true, then we could conclude in short order that prospects of inheritance ought not come under the discharge—*ever*. Once we stipulate, first, that the purpose of the discharge is to *encourage* economic effort, and, second, that inheritances *do not follow* from economic effort, then logically the fresh start need not include them. The syllogism demonstrates that freeing inheritances from the debtor's pre-existing obligations will fail to advance the ends of bankruptcy law.

Yet, one may join issue with Professor MacLachlan's minor premise. Certainly, his commentary is well taken in connection with future interests that will vest *vel non* on the basis of extraneous contingencies. The modern Bankruptcy Code reflects this logic (better even than the Chandler Act did) by capturing for the bankruptcy estate all future interests of the debtor, *whenever* they vest.<sup>108</sup> But MacLachlan's reasoning becomes problematic when extended to expectancies generally. His terse analysis oversimplifies the social and economic context in which inheritances are conferred.

In examining this problem, it may be helpful to distinguish three basic scenarios under which inheritances may descend in connection

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regulation. See, e.g., ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 43-51 (1988); Jackson, *supra* note 90, at 1418; Regan, *supra* note 91, at 201-06.

106. The point was recognized early: "The instances are rare of debtors who under such circumstances ever acquire enough afterwards to pay their old debts; and thus . . . the existing law [offering no discharge] is seldom of any advantage to the creditor, whilst it is injurious to the debtor, and to community in which he resides." COLEMAN, *supra* note 87, at 271 (quoting Joseph Cutler, 1853); see also SIDGWICK, *supra* note 90, at 93; Coles, *supra* note 97, at 297, 350. For modern discussions, see STANLEY & GIRTH, *supra* note 336, at 37-39; Shuchman, *supra* note 96, at 82-83. But see William H. Meckling, *Financial Markets, Default, and Bankruptcy: The Role of the State*, 41 LAW & CONTEMP. PROBS., Autumn 1977, at 13, 29; CREDIT RESEARCH CENTER, CONSUMER BANKRUPTCY STUDY: CONSUMERS' RIGHT TO BANKRUPTCY—ORIGINS AND EFFECTS 81-100 (1982).

107. See *supra* note 71 and accompanying text.

108. See *supra* note 13.

with bankruptcy. First, the debtor's benefactor may be mentally competent and physically capable of action when the debtor seeks bankruptcy relief. Second, the benefactor may be irreversibly *non compos mentis* or physically *in extremis* at that time. Third, whatever the benefactor's mental and physical state, he may have no direct sociological links with the debtor; the debtor could have no inkling of the expectancy in her favor until the day she receives the good news by registered mail. This last scenario, incidentally, is recognized in the lore, if not the law, of inheritance as giving rise to the "laughing heir," the beneficiary who takes in default of close relatives of the decedent.<sup>109</sup> While the scenario usually arises in connection with intestacy, there has been the occasional "laughing legatee" as well.<sup>110</sup>

In fact, only the laughing heir truly falls into the category of persons who do nothing to "earn" their inheritances. Some courts, echoing MacLachlan, have characterized inheritances as windfalls—"visitations of the fickle goddess of fortune," as one judge has put it.<sup>111</sup> But this description rarely befits inheritances by grieving (as opposed to laughing) beneficiaries. To be sure, benefactors leave assets to members of their family in part because they identify their own welfare with that of their relatives—a phenomenon the economists in-

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109. Though the law makes no specific provisions concerning laughing heirs, it nonetheless minimizes the opportunities for inheritance beyond the social network of the benefactor by limiting intestate inheritance in most jurisdictions to the second collateral line of the decedent's blood relatives. More distant relatives do not qualify as heirs, and in default of nearer relatives the decedent's property escheats to the state. See UNIF. PROBATE CODE §§ 2-103, 2-105 (1991).

110. George McGovern, the Democratic Party's nominee for President of the United States in 1972, was a laughing legatee, under circumstances that drip with irony. McGovern's original political platform called for a 100% federal estate tax—effectively abolishing inheritance—on gross estates above \$500,000. He lost. Six years later, in 1978, McGovern inherited the bulk of the estate (amounting to some \$200,000 after taxes) of an "eccentric spinster," whom he did not know, but who had "admired his politics"—which he gratefully accepted. Eileen Shanahan, *McGovern Calls for Tax Reform*, N.Y. TIMES, Jan. 14, 1972, at 14; Eileen Keerdoja et al., *Living Well Is the Best Revenge*, NEWSWEEK, May 23, 1983, at 12-13.

111. *Strom v. Wood*, 164 P. 1100, 1102 (Kan. 1917) (West, J.). Likewise characterizing inheritances as windfalls or analogizing them to lottery winnings, see, for example, *In re Shepard's Estate*, 32 A. 1040, 1041 (Pa. 1895); *In re Kalt's Estate*, 108 P.2d 401, 403 (Cal. 1940); *In re Lybrook*, 951 F.2d 136, 138 (7th Cir. 1991) (Posner, J.). MacLachlan himself described inheritances as "in the nature of a windfall," see *supra* note 77, and other bankruptcy (but not inheritance!) scholars have offered like characterizations. E.g., 4A COLLIER, *supra* note 5, § 70.37, at 460; 3 REMINGTON, *supra* note 13, § 1217, at 61-62. Accordingly, § 541(a)(5) has sometimes been called the "windfall clause." Douglas Q. Wickham, *Chapter 7 or Chapter 13: Guiding Consumer Debtor Choice Under the Bankruptcy Reform Act*, 58 N.C. L. REV. 815, 817 (1980).

sist on calling "interdependent utility functions."<sup>112</sup> But benefactors *also* make bequests because their beneficiaries behave in ways that give them personal satisfaction. Like wage laborers, beneficiaries do, in some sense, earn their inheritances.<sup>113</sup>

Needless to say, there are limits to the analogy of inheritances to wages; gratuitous transfers do differ from classical employment contracts in important ways. Wages ordinarily trace to specific economic activities and obligations and bear a direct relation to the economic value of the services rendered. Bequests, by contrast, ordinarily trace to a diffuse constellation of unstipulated social services (semantically summarized in some testamentary instruments as "love and affection"), and they vary in size according to the available resources of the benefactor. Still, these distinctions are hardly crystal clear. Service agreements often sketch out the employee's responsibilities vaguely, and the earnings they generate may include elements of gratuity, especially when the employee is a member of the employer's family or social network.<sup>114</sup> When the element of gratuity predominates, we have a word for it—we call the employment a *sinecure*. Similarly, some employees (notably performers) earn income, at least in part, by winning the "love and affection" of their employers<sup>115</sup>—a fact that may help to explain why performers' earnings, like gratuities, often seem to bear no rational relation to the services rendered. By the

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112. E.g., Gary Becker, *A Theory of Social Interaction*, 82 J. POL. ECON. 1063, 1074-83 (1974), reprinted in GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 253-81 (1976). Adam Smith, who also discussed the phenomenon, labeled it "sympathy." ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 3 (Dugald Stewart ed., rev. ed., London, Henry G. Bohn 1853) (1759).

113. On the willingness of courts to recognize this functional reality, see *infra* note 188 and accompanying text. The contrary notion, that gratuitous transfers are devoid of any economic significance, has been floated by some contracts scholars and applied to justify the refusal of the law to enforce promises to make gifts. One recent critic suggests that such assertions "reflect little more than mercantilist prejudice." Kull, *supra* note 66, at 49; see *id.* at 47-50; cf. Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 353, 355 (describing gifts and bequests as consistent with a system of free market transfers of personal property).

114. For a nice illustration of such a network, simultaneously employing and giving, see Garry Wills, *Father Knows Best*, 39 N.Y. REV. BOOKS, Nov. 5, 1992, at 36 (discussing the network surrounding Prescott Bush). In addition, commercial *exchange* sometimes takes the form of reciprocal gifts (nowadays often of information). For an anthropological discussion, see CLAUDE LEVI-STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* 52-68 (rev. ed. 1969); for a brief modern treatment, see ARTHUR A. LEFF, *SWINDLING AND SELLING* 141-43 (1976).

115. Employers often make (ostensible) "gifts" to their employees, and some even leave them testamentary bequests. For an example (better known for its legal implications than its factual setting), see *Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955).

same token, gratuitous transfers may arise out of explicit bargains for specific services, a circumstance acknowledged, both linguistically and legally, by the creation of the hybrid legal categories of conditional bequests and contracts to make wills.<sup>116</sup> The line between earnings and gratuities is surely visible to the naked eye—but the closer one looks the blurrier it becomes.<sup>117</sup>

These social facts have not escaped scholarly notice, at least within the field of inheritance law. From Bracton's *De Legibus*, scrivened in the thirteenth century, to *Page on Wills*, typed in the twentieth, commentators have justified freedom of testation on the ground that it promotes socially productive behavior by beneficiaries.<sup>118</sup> The point should not be exaggerated, for persons obviously

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116. The very concept of a contract to make a will—a *bound gratuity*—appears to be a contradiction in terms. But this seeming contradiction derives precisely from the illusory purity of the terms themselves—it is a conceptual solecism that in itself helps to clue us into the fact that the bright line we think we see between these categories is in reality an image created by artificial light.

Not surprisingly, courts struggling to classify contracts to make wills have disagreed over whether they constitute expectancies or choses-in-action for purposes of inclusion in a bankruptcy estate. *Cf. In re Lage*, 19 F.2d 153, 154-55 (N.D. Iowa 1927) (holding that a joint will, reflecting a binding covenant not to revoke the will, created no vested interest in the beneficiary); *In re Meiburg*, 1 F. Supp. 892, 894-95 (N.D. Iowa 1932) (same); *In re Bryson*, 49 F.2d 408, 409-10 (N.D. Tex. 1931) (holding that the debtor's remainder interest under contractual joint will did constitute a vested interest).

117. For discussions of the cultural anthropology and economy of gratuities, emphasizing their existence within a culture of implicit reciprocity, see KENNETH E. BOULDING, *EVOLUTIONARY ECONOMICS* 50-54 (1981); DAVID CHEAL, *THE GIFT ECONOMY* (1988); Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295 (1992) (and commentaries following); and the sources cited in Jane B. Baron, *Gifts, Bargains, and Forms*, 64 IND. L.J. 155, 194-98 (1989); Hirsch, *supra* note 25, at 630 nn.203-05; Hirsch & Wang, *supra* note 97, at 9 n.30; see also the brief but provocative discussion in JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 6-8 (3d ed. 1984) (omitted from the 4th ed.). The haziness of the distinction between gifts and income has caused knotty problems for courts presented with the issue of classifying financial transfers for tax purposes. William A. Klein, *An Enigma in the Federal Income Tax: The Meaning of the Word 'Gift'*, 48 MINN. L. REV. 215 (1963). A number of tax theorists have proposed to merge the two categories and tax all wealth transfers *as income*, as a matter of tax policy. HENRY SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* 56-58, 134-47 (1938); Joseph M. Dodge, *Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income*, 91 HARV. L. REV. 1177 (1978); Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 CONN. L. REV. 1 (1992); John McNulty, *Fundamental Alternatives to Present Transfer Tax Systems, in DEATH, TAXES AND FAMILY PROPERTY* 96-97 (Edward Halbach, Jr. ed., 1977). For a related legal problem caused by categorical ambiguity, see *infra* note 188.

118. 2 HENRY DE BRACTON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 182 (George E. Woodbine ed. & Samuel E. Thorne ed. & trans., 1968) (ms. c. 1230); 1 WILLIAM H. PAGE, *ON THE LAW OF WILLS* § 1.7, at 28 (William J. Bowe & Douglas H. Parker eds., 1960 & Supp. 1993) (citing to judicial authorities). The social utility of the benefactor-



are moved to care for each other by more than the prospect of reward. At the same time, the point should not be shrugged off. As King Lear learned the hard way, our children might behave quite differently toward us were inheritance abolished (or made mandatory).<sup>119</sup> It is a tie, albeit one of many, that binds families together.<sup>120</sup>

With all of this in mind, we can begin to integrate inheritance theory into bankruptcy theory. A debtor who becomes hopelessly insolvent will not only be disinclined to engage in ordinary economic labor; to the extent that creditors can also levy against her expectancies, the debtor will have a disincentive to engage in the sorts of behavior that occasion gratuitous transfers. By granting the debtor a discharge, the law rekindles the debtor's interest in selling her labor; and by including inherited assets within the ambit of the discharge, the law also encourages her to produce "social capital"<sup>121</sup>—that is, social resources derived from reciprocal benevolence—whereby the aged may be provided with care, comfort, and other aspects of filial devotion.

Such an analysis is not completely alien to the thinking of those judges who have taken the time and trouble to contemplate the problem. The Supreme Court in *Local Loan* spoke generally of the need to give the debtor a "new opportunity in life" and a "clear field for future effort,"<sup>122</sup> and in a subsequent dictum in *Segal v. Rochelle* the Court amplified the point, asserting that the aim of the discharge was "to leave the bankrupt free after the date of his petition to accumulate new wealth in the future."<sup>123</sup> That meant the expectancy of future wages did not qualify for inclusion in the bankruptcy estate, "nor, analogously, [did] an intended bequest to [the debtor] or a promised gift—even though state law might permit all of these to be alienated in advance."<sup>124</sup>

The opinion in *Segal* offered no explicit rationale for consolidating its analysis of future wages and future gratuities, but the Court's

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beneficiary relation is not universally accepted. For a further discussion, see Hirsch & Wang, *supra* note 97, at 9-11.

119. See WILLIAM SHAKESPEARE, *KING LEAR*.

120. The point first struck me in college, when it became apparent to me—perhaps the reader has had a similar experience—that my rich friends were far more concerned about their relationships with their parents than my poor friends. Prospects of inheritance (and the loss of it) even lay somewhere in the back of the mind of the young John F. Kennedy. NIGEL HAMILTON, *JFK: RECKLESS YOUTH* 155, 713 (1992).

121. JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 300-21 (1990).

122. *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934).

123. *Segal v. Rochelle*, 382 U.S. 375, 379 (1966).

124. *Id.* at 379-80.

readiness to do so suggests an intuitive recognition that the two, if not conceptual twins, are at least related.<sup>125</sup> A little-remarked line of cases, addressing the treatment of insurance contracts owned by the debtor but covering the lives of others, offers a still more pertinent strain of reasoning. Life insurance contracts are ordinarily exempt from creditors' claims under Section 522, the exemption provision of the Bankruptcy Code,<sup>126</sup> yet the six-month window created by Section 541(a)(5) includes a subsection reserving for the bankruptcy estate the *proceeds* of life insurance that, like bequests, become due within a half-year of bankruptcy.<sup>127</sup> When the debtor *owns* a policy on the life of another<sup>128</sup> these two provisions conflict, and the circuit courts have split in resolving whether proceeds under these circumstances are exempt *per se* under the Code's exemption provision or includable *per se* under the six-month window.<sup>129</sup>

The Ninth Circuit reconciled the two sections by distinguishing "ownership" rights from rights to proceeds, asserting that Section 522

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125. Cases arising prior to the Chandler Act drew the same relationship implicitly, defending the discharged debtor's right to retain a subsequent inheritance on the ground that "[i]t is the theory of the Bankruptcy Act that . . . [it] leaves to [the debtor] future prospects and rights which materialize at a future day." *Baker v. Shoun (In re Baker)*, 13 F.2d 707, 708 (6th Cir.), *cert. denied*, 273 U.S. 733 (1926); *see also Bank of Elberton v. Swift (In re Swift)*, 268 F. 305, 306 (5th Cir. 1920) (stating that one of the main purposes of the Bankruptcy Act is to protect after-acquired property from creditors' claims).

126. 11 U.S.C. § 522(d)(7) (1988), and analogous state exemption laws, which are effective in bankruptcy under 11 U.S.C. § 522(b)(2)(A) (1988). On the development and proliferation of the exemption for life insurance under state law, see William A. Brackney, *Creditors' Rights in Life Insurance*, PROB. & PROP., Mar./Apr. 1993, at 52; Stefan A. Riesenfeld, *Life Insurance and Creditors' Remedies in the United States*, 4 UCLA L. REV. 583 (1957). Where life insurance is not exempt and is owned by the debtor (or where the benefactor's designation of the debtor as beneficiary is irrevocable), the policy becomes part of the bankruptcy estate and can be used to satisfy creditors. Countryman, *The Use of State Law*, *supra* note 22, at 447 (citing to case law).

127. 11 U.S.C. § 541(a)(5)(C) (1988).

128. Although this scenario may seem odd on first glance, it is no oddity to estate planners. Benefactors who purchase life insurance on their own lives are commonly advised to give their unmaturing policies to the intended beneficiaries as gifts. Because the policies balloon in value at death, their transfer *inter vivos* generates estate tax efficiencies. And the result is that beneficiaries then own unmaturing insurance policies on other persons' lives. For a discussion, see JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 982-83 (4th ed. 1990).

129. Compare the usual case where a debtor holds a policy on her own life. The policy constitutes exempt property under 11 U.S.C. § 522 (1988), but suppose it is the debtor herself who then dies within six months of bankruptcy. Can the debtor's creditors claim the proceeds of the matured policy under § 541(a)(5)(C)? The answer is no. The proceeds, whether they flow directly under the terms of the contract to a third party beneficiary or through the debtor's own probate estate to beneficiaries, never become property of the debtor, and hence do not go to her bankruptcy estate. *Redfield v. Ansbro (In re Goldberg)*, 98 B.R. 353, 358-59 (Bankr. N.D. Ill. 1989).

protects the insurance contract only if it does not become payable within six months of bankruptcy.<sup>130</sup> This result may well be correct as a matter of technical statutory construction,<sup>131</sup> but the Fourth Circuit disagreed, holding that Section 522 should preempt Section 541(a)(5) when the proceeds stem from an insurance contract owned by the debtor. A debtor who retains ownership of an insurance policy after bankruptcy will be obliged to continue to pay premiums under the policy, the court observed, and "if the debtor fulfills his contractual obligations [postpetition] . . . he should not be denied the benefits of the contractual relationship. In this sense, proceeds do *not* represent a windfall . . . ." <sup>132</sup>

Thus did the Fourth Circuit cut through the Code and down to the quick. Were debtors denied the proceeds of their insurance contracts following bankruptcy, they would lose their incentive to maintain their coverage. The six-month window should not apply when the death benefits at issue are contingent upon *the debtor's* further efforts. Presumably the Fourth Circuit would apply the same logic to will *contracts* and *conditional* bequests, even if they matured within six months of bankruptcy, so long as they called for explicit postpetition services by the beneficiary. Such cases would raise an analogous conflict between Section 541(a)(5) and (a)(6), excepting from the bankruptcy estate postpetition "earnings from services."<sup>133</sup> But, in fact, to apply this principle to the *implicit* social services that underlie virtu-

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130. *Woodson v. Fireman's Fund Ins. Co.* (*In re Woodson*), 839 F.2d 610, 618, 620 (9th Cir. 1988); *accord In re McAlister*, 56 B.R. 164, 166 (Bankr. D. Or. 1985); *In re Poynor*, 68 B.R. 919, 922 (Bankr. N.D. Tex. 1987), *aff'd sub nom. Cyrak v. Poynor*, 80 B.R. 75 (N.D. Tex. 1987). See also *In re Sharik*, 41 B.R. 388, 390 (Bankr. E.D.N.C. 1984), where the court held that a debtor's death benefits as beneficiary under a life insurance contract owned by his spouse, who died within six months of debtor's bankruptcy, became property of the estate under § 541(a)(5)(C), despite the fact that the decedent spouse was a codebtor in the debtor's bankruptcy proceeding and had claimed the asset as exempt with respect to *her* petition.

131. "The analysis advanced by [the debtor] . . . overlooks the distinction between owning a policy and being its beneficiary. . . . Section 522 deals with one interest, Section 541 with the other. That the debtor in this case happened to wear both hats is of no consequence." *Woodson*, 839 F.2d at 618.

132. *BancOhio Nat'l Bank v. Walters*, 724 F.2d 1081, 1083 (4th Cir. 1984) (emphasis added).

133. 11 U.S.C. § 541(a)(6) (1988). Compare *Hooker v. Peterson*, 204 S.W. 858 (Tenn. 1918), decided prior to the Chandler Act, where a debtor contracted with a benefactor to provide labor as consideration for a bequest. Services continued until the benefactor's death, ten months after the debtor's bankruptcy petition. The court held that this contract was not property of the estate, because "[i]t could not be known . . . whether . . . [the debtor] would continue to perform the services, . . . or whether he would fail so to do through inability, . . . or through his own purpose." *Id.* at 860.

ally every gratuitous transfer requires no colossal stretch of logic. At least with regard to "grieving" heirs, there are no unearned windfalls at all.

Yet, this argument may contain the seeds of a potent counter-argument. For if inheritances *are* earned, in some sense of the word, then it becomes necessary to ask *when* they are earned. By tradition, the Bankruptcy Code has distinguished between earnings accrued pre- and postpetition, allocating to creditors all nonexempt property accumulated prior to bankruptcy.<sup>134</sup> The fresh start, in other words, operates prospectively. This doctrine follows readily from discharge theory, which aims to restore the debtor's incentive to engage in productive activity. Prior to the hopelessness that prompted the bankruptcy proceeding, the debtor had every incentive to produce, and the fruits of *that* labor can be confiscated without cost to society.<sup>135</sup> Yet, when a debtor inherits, hasn't she "earned" her bequest not at the precise moment when it vests, but rather over a protracted period of time? If we analogize expectancies to employment income, is not *deferred* income the more precise analogy, which under traditional analysis would flow back into the bankruptcy estate to the extent that it traced to services rendered prepetition, irrespective of when it was actually paid?<sup>136</sup>

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134. See *supra* notes 1-3 and accompanying text.

135. One could, in fact, argue that there is some utility in applying the discharge retroactively, for there will in practice be some hiatus between the onset of insolvency and the petition in bankruptcy. Debtors in general slide gradually into bankruptcy, and those anticipating an imminent petition may be less productive in the months leading up to it than they would have been otherwise. By awarding a discharge as of, say, four months *prior* to bankruptcy, the law might modify debtors' productive incentives over that period, thereby avoiding antecedent social costs (and also helping to ensure that anticipation of bankruptcy is not a self-fulfilling prophecy). By denying debtors the right to discharge debts for "luxury goods and services" incurred within 40 days of bankruptcy, lawmakers have already acknowledged the need to deter detrimental conduct by debtors in anticipation of bankruptcy (and, of course, by avoiding preferences made within 90 days of bankruptcy, lawmakers have taken similar precautions against prescient creditors). 11 U.S.C. §§ 523(a)(2)(C), 547 (1988). But relative to the distortions avoided by these provisions, the social costs stemming from depressed laboriousness in anticipation of bankruptcy may be insignificant.

136. For an early discussion, see *Stein v. Leibowitt (In re Leibowitt)*, 93 F.2d 333, 335 (3d Cir. 1937), *cert. denied*, 303 U.S. 652 (1938). For a recent discussion in connection with a professional football contract, see *In re Clark*, 891 F.2d 111, 115 (5th Cir. 1989). Courts have divided over the technical application of such an analysis. So long as deferred income was earned entirely prepetition it makes no difference when the income was ultimately paid over. *E.g.*, *Hebermehl v. United States (In re Hebermehl)*, 132 B.R. 651, 653-54 (Bankr. D. Colo. 1991). If deferred income was earned prepetition but paid along with postpetition earnings, and the two can be readily traced and segregated, the court will order a temporal accounting. *E.g.*, *Calder v. Segal (In re Calder)*, 94 B.R. 200, 203 (Bankr.

In the case of an inheritance vesting within six months of bankruptcy, *virtually the entire bequest* would seem to derive from "love and affection" lavished prior to the petition. Indeed, this reasoning could at last provide a theoretical justification, which has thus far proven elusive,<sup>137</sup> for extending the line of cleavage for inherited assets only for a limited span of time. Such a rule arguably pulls back into the estate assets effectively "earned" already, while leaving to the debtor those that she manages to earn thereafter. In this connection, the decision to delay the discharge for *precisely* 180 days with respect to expectancies may be criticized as arbitrary. But this arbitrariness is born of necessity, given the technical difficulty, inherent in the very nature of reciprocal benevolence, of temporally accounting for remuneration from social services.<sup>138</sup>

A possible rejoinder to this argument is that expectancies differ from ordinary employment income in one highly pertinent respect: The services that "earn" them create no proprietary rights in the provider, and hence the trustee in bankruptcy, stepping into the debtor's shoes, cannot sue the benefactor in *quantum meruit*. Within the realm of employment remuneration, the closest parallel would be to a discretionary bonus, which courts have unanimously assigned to the debtor when awarded *at any time* following a petition. By placing such bonuses (and, by analogy, expectancies) under the umbrella of

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D. Utah 1988), *aff'd sub nom.* Calder v. Rupp, 912 F.2d 454 (10th Cir. 1990). Where prepetition earnings are deferred and entangled with postpetition labor, however, some courts have awarded the deferred income to the debtor. *E.g.*, Boyle v. Stefurak (*In re Sloan*), 32 B.R. 607, 613 (Bankr. E.D.N.Y. 1983). Other courts have considered when the "bulk of the work" was performed. *E.g.*, Kleinfeld v. FDIC (*In re Froid*), 109 B.R. 481, 483 (Bankr. M.D. Fla. 1989). Still other courts have applied "equitable principles" to allocate a portion of deferred income to the bankruptcy estate, even when its pre- and postpetition derivations cannot be determined with precision. *E.g.*, *In re Malloy*, 2 B.R. 674, 676 (Bankr. M.D. Fla. 1980). *See generally* Countryman, *The Use of State Law*, *supra* note 22, at 449-55 (discussing the treatment of future payments in bankruptcy); Pitts, *supra* note 13, at 61-73, 80-88 (same).

137. *See supra* note 85, and text accompanying notes 34 & 82.

138. On the alternative approaches courts have taken to the problem of temporal accounting in such circumstances, see *supra* note 136. One court has described the six-month window simply as "a considered balance between the Code's fresh start policy and its corresponding concern to effect a fair distribution of the debtor's property to her creditors." Togut v. Hecht, 69 B.R. 290, 291 (S.D.N.Y. 1987). This conception lacks independent significance, and as a consequence begs the question. Apart from the policies underlying the fresh start, creditors have a "fair" claim to *all* the debtor's nonexempt property necessary to satisfy her debts. The decision to offer the discharge as of the date of the petition in and of itself embodies a balancing of creditors' interests against the utility of the fresh start, so we are still left with the issue of whether there is any reason under *discharge* theory to establish separate dates of cleavage for different varieties of property.

the fresh start, the employee retains her incentive to *complete* the services that will in due course prompt her employer to confer them.<sup>139</sup>

But such an interpretation is ultimately too cold-blooded. In the real world of human emotion, persons do not turn love and affection on and off like a lightbulb.<sup>140</sup> After years of devotion, how likely is a debtor to withhold social services during the six-month period when her expectancies remain vulnerable to creditors' claims? Even the coldly calculating debtor would find it in her interest to continue providing social services, lest her benefactor survive the six months and take umbrage at this spontaneous lapse of attention. At any rate, assuming normal family relations, the temporary suspension of the fresh start mandated by Section 541(a)(5) almost certainly has no impact on a debtor's willingness to furnish loved ones with their accustomed social service. Thus, the bankruptcy estate can include what are effectively past "earnings" without compromising the debtor's future conduct.

A better answer to the argument that debtors can be denied a discharge for inheritances (at least for six months) without impairing their incentives after bankruptcy is that such a denial will not, in practice, help creditors very much. Whenever we assess the social consequences of legal rules, we must bear in mind that they cast their shadow upon the world both after *and before* the fact.<sup>141</sup> Whatever its aftereffects on beneficiaries' behavior, a rule pouring inheritances back into the bankruptcy estate will also have *ex ante* implications for the behavior of benefactors. A six-month window of vulnerability will function primarily to deter direct bequests to debtors,<sup>142</sup> with the con-

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139. On the treatment of bonuses, see *Vogel v. Palmer (In re Palmer)*, 57 B.R. 332, 335 (Bankr. W.D. Va. 1986) (holding that bonuses are discretionary income earned only upon determination of the chief executive officer that the employee's performance was satisfactory and conditioned in part on his employment as of a post-petition date).

140. In this respect as well, social life differs from commercial life—but how different is different? Witness the phenomenon of "company loyalty." Once again, the images blur at the margin.

141. For a general discussion of the *ex ante* consequences of rules in policy analysis, see Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 10-12, 19-33 (1984). Lately, the quantum physicists have weighed in with a similar conclusion: Events can affect both the future *and past* behavior of particles. See John A. Wheeler, *Delayed-Choice Experiments and the Bohr-Einstein Dialogue*, in AMERICAN PHILOSOPHICAL SOCIETY, PAPERS READ AT A MEETING, JUNE 5, 1980, at 9 (1981).

142. JACKSON, *supra* note 25, at 261 n.15; cf. MACLACHLAN, *supra* note 20, at 178 (acknowledging but questioning this argument). On benefactors' behavior, see *infra* notes 201-203, 238 and accompanying text. In this same vein, a rule capturing inheritances in

sequence that resources will be diverted away from them *and* from their creditors.

It is part and parcel of the theory of the discharge that, by absolving debts, lawmakers spark economic activity that would not have occurred otherwise and that creditors, accordingly, would not otherwise have been able to capture. Debtors and society gain substantially, but not at the expense of creditors.<sup>143</sup> The same principle applies here: By freeing expectancies from creditors' claims, the debtor (and, to the extent that social behavior is affected, society) would benefit, the

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bankruptcy could also prompt debtors simply to *disclaim* them *ex post* in order to thwart creditors. This was a viable strategy under the former Bankruptcy Act, see *supra* note 25. Some early courts accordingly cited to the debtor's power of disclaimer in bankruptcy as a justification for the rule permitting the debtor to *keep* post-petition inheritances. *In re Lage*, 19 F.2d 153, 154-55 (N.D. Iowa 1927); *In re Meiburg*, 1 F. Supp. 892, 895 (N.D. Iowa 1932). Though most courts have held disclaimers ineffective in bankruptcy under the Code, see *supra* note 25, the superstructure of the argument offered in the early cases—that a rule capturing inheritances will not in practice adhere to the benefit of creditors—remains sound in the context of the rule's *ex ante*, if not *ex post*, consequences.

143. See *supra* note 106 and accompanying text. Other incarnations of this principle can be found elsewhere in debtor-creditor law. Spendthrift trusts have been upheld on this basis: Although they provide resources for debtors that creditors cannot reach, creditors would be no better off if spendthrift clauses were ineffective, because no transfer would otherwise have been made to insolvent debtors. Thus, they aid debtors without significantly harming creditors. *Scott v. Bank One Trust Co.*, 577 N.E.2d 1077, 1083 (Ohio 1991). Similarly, creditors' rights to levy against contingent interests owned by the debtor have been struck down on the ground that they generally do not, upon forced sale, fetch their full expected value. Debtors, who are then subject to deficiency judgments, would be significantly harmed by such a levy, while creditors would gain little by it. *Suskin & Berry v. Rumley*, 37 F.2d 304, 306 (4th Cir. 1930); *Smith v. Gilbert*, 41 A. 284, 285-86 (Conn. 1898); *Adams v. Dugan*, 163 P.2d 227, 231 (Okla. 1945); *Howbert v. Cawthorn*, 42 S.E. 683, 686 (Va. 1902); see *Jones v. Harrison*, 7 F.2d 461, 465 (8th Cir. 1925) (issue raised in connection with trust construction), *cert. denied*, 270 U.S. 652 (1926); see also *Hirsch & Wang*, *supra* note 97, at 35 n.136; Annotation, *Contingent Remainder as Subject to Claims of Creditors*, 60 A.L.R. 803, 803-06 (1929) (noting that in many, though not all, jurisdictions, a contingent remainder is not subject to levy and sale on an execution or attachment); Annotation, *Garnishment Against Executor or Administrator by Creditor of Heir, Legatee, Distributee, or Creditor of Estate*, 59 A.L.R. 768, 786-90 (1929) (discussing the fact that a contingent or other remote interest in property under a will cannot be fairly appraised and sold on execution, and thus is not open to attachment in the hands of an executor or trustee under the will); *Plumb*, *supra* note 22, at 92-93 (discussing proposed bankruptcy provision excluding from the bankruptcy estate contingent interests expected to fetch "a nominal or disproportionately small price as compared to the value to the debtor"); *supra* note 13. A debtor's right to exempt from creditors' claims an unmaturing life insurance policy has been similarly rationalized:

The right to maintain a policy may be a very important one, particularly if the principal's insurability has deteriorated since the policy was purchased. . . . But this right to maintain the policy is of value to the debtor only; it is not capable of sale or transfer and is therefore of little use to [creditors].

*Woodson v. Fireman's Fund Ins. Co.* (*In re Woodson*), 839 F.2d 610, 618 (9th Cir. 1988); see *Plumb*, *supra* note 22, at 61-63.

transaction cost of diversion would be avoided, and creditors would be left no worse off than they are now.

To be sure, this analysis may not apply in certain situations. Consider expectancies from benefactors who are physically *in extremis* or who have lost their testamentary capacity by the time of a beneficiary's petition for bankruptcy relief. In such a case, the beneficiary would already have done whatever was required to receive her inheritance. In effect, the expectancy would have matured into a future interest that should, if so characterized, flow into the estate under the modern Bankruptcy Code whether it vested in possession in six months or six years.<sup>144</sup> Including it in the estate would have no impact on the beneficiary's future behavior. But the effect of the rule on the *benefactor's* behavior is, under these circumstances, a matter of conjecture.

Of course, a benefactor who is too infirm to alter his estate plan when his beneficiary enters bankruptcy perforce cannot act to foil creditors *at that time*. But if a benefactor knew that a wealth transfer pending while he was incapacitated could be lost to his beneficiary, that awareness in and of itself might motivate him to take testamentary precautions while his health still held. Thus, the *ex ante* consequences of a rule capturing the expectancies of incapacitated beneficiaries could simply proceed (or rather precede) one step sooner.<sup>145</sup> Still, this scenario may assume more forethought—and foresight—than can reasonably be expected of most benefactors. The impact of bankruptcy rules on incapacitated benefactors' behavior ultimately remains unclear.

That lawmakers had this very situation in mind when they created the six-month window is strongly suggested by their decision to limit its application to *testamentary* transfers.<sup>146</sup> A benefactor can give or withhold inter vivos gifts as legal prudence demands, but a benefactor who gives by necessity of death is often unable to deliberate (at least for some space of time) before making the transfer. As a result, the benefit to creditors of a delayed fresh start is likely to be greater with

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144. See *supra* note 13.

145. Compare *Baker v. Shoun (In re Baker)*, 13 F.2d 707 (6th Cir.), *cert. denied*, 273 U.S. 733 (1926), decided prior to the Chandler Act, where the court posited that an expectancy from an ill or incompetent benefactor was not property of the bankruptcy estate, since "even then there might be mental recovery, followed by transfer, before death, or there might have been a will or conveyance *before* incompetency." *Id.* at 708 (emphasis added). Some benefactors prepare *ex ante* for the possibility of incompetency by executing durable powers of attorney. See UNIF. PROBATE CODE §§ 5-501 to 5-505 (1991).

146. See *supra* note 23.



respect to expectancies of this sort. Nevertheless, the circumstance of incapacitation is exceptional, and lawmakers could treat it under a more limited, and better adapted, rule than the prevailing one.<sup>147</sup>

Also questionable is the application of the analysis developed here to succession by laughing heirs. When an inheritance goes by default to a distant relative who had no sociological connection to the decedent, then it more closely resembles an unearned windfall. In this instance the benefactor is also less apt to respond *ex ante* to the impending bankruptcy of a beneficiary about whose affairs he is either ignorant or indifferent. Discharge theory offers little justification for including this type of expectancy in the fresh start, because inclusion is unlikely to have behavioral repercussions for *either* party to the gratuitous transfer. (On the other hand, that logic applies to creditors, too: When an inheritance springs out of nowhere, creditors undoubtedly will never have relied on them.) At any rate, this circumstance is again an exceptional one that could be singled out for special treatment in bankruptcy. Whether doing so as a practical matter would be worth the trouble, even if deemed theoretically proper, is another matter. One is hard pressed to conceive of a principled standard whereby courts could distinguish heirs who are laughing from those who are grieving, and a troublesome gray area lies in between.<sup>148</sup> Given the practical difficulty of telling them apart, it may be just as well to treat all heirs alike.<sup>149</sup>

In the usual case, at any rate, discharge theory appears no more compelling than reliance theory to justify inclusion of expectancies in the bankruptcy estate, even when they vest near in time to the peti-

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147. Arguably, the simplest way to deal with bequests from benefactors who are physically *in extremis* or who lack testamentary capacity under discharge theory would be to recognize them as functional equivalents of future interests and treat them accordingly under the Bankruptcy Code. In that event, the estate could be held open as long as necessary for the expectancy to vest (assuming creditors decided it was to their economic advantage to do so). (If a benefactor subsequently recovered unexpectedly under these circumstances, he would of course still have the right to disinherit the debtor—and her creditors—by altering his will.) Cf. *Baker*, 13 F.2d at 708 (quoted *supra* note 145). See also *infra* note 194 and accompanying text.

148. Consider, for example, cousins whom a benefactor saw, but only at the occasional family gathering. Sociological ties may *exist*, but they may be attenuated.

149. So far as discharge theory is concerned, a rule distinguishing and capturing for the bankruptcy estate all “unearned” expectancies could remain in effect indefinitely, or for as long as creditors care to hold the estate open. But it must again be pointed out that such a rule would create a conceptual inconsistency, in that debtors have the right to other unearned postpetition windfalls under the discharge as currently applied. See *supra* text accompanying note 81.

tion. For all their fancy footwork, neither Weinstein nor MacLachlan ultimately provided Section 541(a)(5) with a solid leg to stand on.

### C. Abuse Theory

There remains one final, if ineffable, ground on which to predicate the six-month window, a ground not articulated in the legislative history, but which can readily be dug out of its subtext. The capture of inheritances for the bankruptcy estate may serve to prevent debtors from *planning for bankruptcy*. The very fact that the debtor is aware of her inheritance prospects and files her petition with the intention thereby to preserve them under the fresh start may itself be deemed a corruption of bankruptcy process. Weinstein almost certainly had that peripherally in mind when he spoke of debtors who “invoke the Act to escape payment” as committing an “abuse.”<sup>150</sup> One early commentator similarly commended the six-month window for parrying efforts by debtors “acting in bad faith” to “use the bankruptcy act as a means of evading payment of debts.”<sup>151</sup> More recently, the Ninth Circuit described the six-month window explicitly as functioning to “[prevent] debtors from manipulating the bankruptcy date so as to deprive creditors of certain assets.”<sup>152</sup> This rationale would again suggest an explanation for the temporal limit on Section 541(a)(5). For if an inheritance follows hard on the debtor’s petition, one can then infer readily (but not otherwise) that the debtor timed the event with her interests in mind.<sup>153</sup> In this regard, the mechanical operation of the six-month window, eschewing a case-by-case inquiry into the debtor’s motives, could be conceptualized as an administratively efficient deterrent,<sup>154</sup> not unlike the Bankruptcy Code’s treatment of preferences

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150. See *supra* note 33 and accompanying text. Paul King, who chaired the National Bankruptcy Conference that drafted the Chandler Act, testified before Congress in a similar vein: “At least [the six-month window] obviates the situation where the rich aunt is about to leave this mundane sphere and the nephew is in financial difficulties and wants to reap the benefits entirely of the bequest that is coming and takes the step into bankruptcy.” H.R. 10382 Hearings, *supra* note 20, at 318 (statement of Paul King). Unlike Weinstein, King did *not*, at least expressly, set out his scenario of abuse in the context of creditor reliance. Cf. *id.* at 316-17 (testimony by Weinstein).

151. Louis D. Gage, Jr., Note, 1947 WIS. L. REV. 398, 399.

152. *Woodson v. Fireman’s Fund Ins. Co (In re Woodson)*, 839 F.2d 610, 619 (9th Cir. 1988); see also *In re Hamill*, 317 F. Supp. 909, 912 (D. Kan. 1970). For an early case decrying (but not overriding) such manipulation, see *Bank of Elberton v. Swift (In re Swift)*, 268 F. 305, 307-08 (5th Cir. 1920).

153. See, e.g., *Swift*, 268 F. at 307. Here, to update a maxim coined long ago, the principle of *pre hoc ergo propter hoc* applies.

154. Weinstein, recall, spoke of actions by debtors that “should be discouraged.” See *supra* note 33 and accompanying text.

under Section 547. That provision, which functions to deter bankruptcy planning by creditors (as opposed to the debtor), overrides improvements in their position within three months of bankruptcy, also without considering evidence of intent.<sup>155</sup> Under the former Bankruptcy Act, intent to opt out of the bankruptcy proceeding had to be proven in order to avoid a creditor's preference, an approach that had generated much litigation.<sup>156</sup> The Code abolished the intent-based standard to escape from the resulting administrative burden, relying instead on temporal proximity as a surrogate for intent.<sup>157</sup> Likewise, according to the Ninth Circuit, "Section 541(a)(5) makes it unnecessary for the court to resolve . . . difficult questions about the debtor's intent. It provides a prophylactic rule that operates without regard to the debtor's subjective state of mind."<sup>158</sup> Still, the fundamental issue remains: Is the debtor's intent to improve her position, knowing that inheritance is nigh, a sufficient cause for legislative intervention at all?

One way to examine this question is to consider the *moral* implications of the debtor's action in such a case. Is the debtor's decision to rush ahead with her petition so as to antecede an inheritance morally objectionable? Some critics have not hesitated to assert, though without analysis, that it is. One early court characterized the debtor's petition in these circumstances as "bad in morals," proceeding from an "unworthy motive."<sup>159</sup> Another court branded the debtor's

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155. 11 U.S.C. § 547(b) (1988).

156. Bankruptcy Act § 60(b) (previously codified at 11 U.S.C. § 96(b)); BAIRD, *supra* note 55, at 170.

157. JACKSON, *supra* note 25, at 130-31; BAIRD, *supra* note 55, at 170.

158. *Woodson*, 839 F.2d at 620. Drawing the same conclusion, see Case Note, 49 COLUM. L. REV. 270, 271 (1949). In *Woodson*, the manipulation was manifest, the debtor having filed his petition three days before his parent's death from a pre-existing terminal illness: "[H]er death could not have come as a surprise to [the debtor]." *Woodson* at 620. But the failure of § 541(a)(5) to inquire into intent (as, *mutatis mutandis*, under modern preference law) will result in its application to at least *some* unanticipated expectancies. E.g., *In re Poyner*, 68 B.R. 919, 920 (Bankr. N.D. Tex. 1987) (benefactor died in an automobile accident shortly after beneficiary's bankruptcy). One commentator who endorsed the Ninth Circuit's interpretation of the six-month window accordingly urged that wrongful death actions be *excepted* from its purview on the ground that when these causes of action arise postpetition they usually derive from accidents that *occurred* postpetition and thus could not ordinarily have been anticipated. Case Note, *supra*, at 271; see also Recent Decision, 35 VA. L. REV. 112, 113 (1949). (On the unsettled state of the law in this area, see *supra* note 22.) Such an approach, if followed, would carve out an exception for the (relatively rare) situation where intent could not be inferred—just as preference law does, by analogy, in the situation where creditors' positions are improved in the ordinary course of business. See 11 U.S.C. § 547(c)(2) (1988).

159. *In re Hall*, 16 F. Supp. 18, 18 (W.D. Tenn. 1936).

preinheritance petition "inequitable and unconscionable."<sup>160</sup> It may be noted that these same early courts nonetheless upheld the offensive petitions, observing that "[t]his statute makes no provision for exceptional instances based upon bad motive or fraudulent intent."<sup>161</sup> Modern courts have followed the same course, refusing to dismiss on grounds of "bad faith" bankruptcy filings timed strategically, so long as the debtor acted "within his legal rights."<sup>162</sup> But these judgments, of course, hung on a legal assessment of judicial power, not a moral

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160. *In re Swift*, 259 F. 612, 613 (N.D. Ga. 1919), *aff'd sub nom.* Bank of Elberton v. Swift (*In re Swift*), 268 F. 305 (5th Cir. 1920).

161. *Hall*, 16 F. Supp. at 18; *see also Swift*, 259 F. at 614; *Bank of Elberton*, 268 F. at 307-08. Compare *In re Weidenfeld*, 257 F. 872 (E.D.N.Y. 1919), where creditors had filed an *involuntary* petition against the debtor, which he contested. Prior to adjudication, the debtor inherited property. He then sought to *withdraw* his objection to adjudication, which would have left him with his inheritance under pre-Chandler Act law. Simultaneously, the creditors sought to withdraw their involuntary petition! Despite the occurrence of strategic behavior on both sides, the court concluded that the Bankruptcy Act vested it with authority to refuse the debtor's motion and grant that of the creditors.

It does not seem to me that it was ever the intention of those who enacted the Bankruptcy Law . . . to permit a bankrupt, who has resisted an adjudication for nearly two years, to suddenly change his attitude . . . .

The attitude of this alleged bankrupt has already been the subject of [negative] comment . . . .

*Id.* at 873-74.

162. *In re Thompson*, 4 B.R. 18, 21 (Bankr. D. Me. 1979) (petition timed to protect a workmen's compensation claim); *see Bank of Sturgeon v. Stewart (In re Spelman)*, 19 F.2d 138, 138 (8th Cir. 1927) (petition timed to protect a preference); *In re Cummings*, 84 F. Supp. 65, 71-72 (S.D. Cal. 1949) (petition timed to protect property settlement); *In re Goulding*, 79 B.R. 874, 875-76 (Bankr. W.D. Mo. 1987) (petition timed to protect spendthrift trust distribution); *Bowers Distillery, Inc. v. Kragness (In re Kragness)*, 63 B.R. 459, 465-66 (Bankr. D. Or. 1986) (same); *see also Camden v. Fike (In re Fike)*, 117 F.2d 667, 668 (7th Cir. 1941) (eschewing analysis of motive for filing in general); *In re Chilhowee R-IV School District*, 145 B.R. 981, 983 (Bankr. W.D. Mo. 1992) (permitting bankruptcy planning so long as debtor acted within the law). Nonetheless, some courts have denied petitions for lack of good faith when debtors engaged in other sorts of "obvious clever planning," despite their technical compliance with the requirements of the Bankruptcy Code. *In re Campbell*, 124 B.R. 462, 464 (Bankr. W.D. Pa. 1991) (emphasis omitted) (debtor placed all assets beyond reach of creditors under nonbankruptcy law); *In re Brown*, 88 B.R. 280, 284-85 (Bankr. D. Haw. 1988) (same); *In re Hammonds*, 139 B.R. 535, 541 (Bankr. D. Colo. 1992) (debtor engaged in sham transactions and was using bankruptcy as a delaying tactic); for other recent judicial discussions of the implicit good faith requirement in bankruptcy, *see In re Keebler*, 106 B.R. 662, 664-65 (Bankr. D. Haw. 1989); *In re Khan*, 35 B.R. 718, 719 (Bankr. W.D. Ky. 1984); for scholarly discussions, *see Gross, Fresh Start, supra* note 90, at 93, 100; Robert L. Ordin, *The Good Faith Principle in the Bankruptcy Code: A Case Study*, 38 BUS. LAW. 1795 (1983); *see also Lawrence Ponoroff & F. Stephen Knippenberg, The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919 (1991) (addressing reorganizations); *Good Faith: A Roundtable Discussion*, 1 AM. BANKR. INST. L. REV. 11 (1993).

assessment of the parties' equities.<sup>163</sup> If they can be read as calling upon Congress to turn its own moral hand to the problem, then Congress apparently responded with the passage of the Chandler Act.

Ethical analysis of the debtor-creditor relation has a rich history. Many early thinkers deemed failure to satisfy a creditor as the moral equivalent of *theft*. To default after borrowing property loaned on the pretense of a promise to repay seemed, at least within a communitarian society, hardly different from stealing the property out of the lender's house.<sup>164</sup> Accordingly, early English insolvency statutes had a quasi-criminal flavor; some bankrupts were even hanged in Great Britain.<sup>165</sup> But by at least the seventeenth century, if not earlier, theorists had also begun morally to distinguish deliberate defaulters from those who failed to satisfy their debts as a result of uncontrollable personal misfortune. Whereas "the wilful Bankrupt is one of the *worst sort of Thieves*," still "the Honest Debtor, who fails by visible Necessity" deserved "Pity and Compassion."<sup>166</sup> Over the same histor-

163. Thus, for example, the court in *Goulding* ruled, "albeit reluctantly . . . that it is the duty of a Judge to apply the laws as written by Congress, rather than to substitute personal abstract concepts of justice and morality, to the cases it hears." *Goulding*, 79 B.R. at 876.

164. "But then, To *Borrow*, without any due care to *Repay*, or to *Return* that which has been borrowed; this is most certainly so near to a sort of *Stealing*, that it will bring one into a Bundle with that sort of *Tares*." COTTON MATHER, A FLYING ROLL, BROUGHT FORTH TO ENTER INTO THE HOUSE AND HAND OF THE THIEF 16 (Boston 1713). For comparable early English attitudes toward default, see DeLloyd J. Guth, *The Age of Debt, the Reformation and English Law*, in TUDOR RULE AND REVOLUTION 69 (DeLloyd J. Guth & John W. McKenna eds., 1982).

165. "A bankrupt . . . was formerly considered merely in the light of a criminal or offender. . . ." 2 BLACKSTONE, *supra* note 88, at \*471-73. Imprisonment for debt began in the thirteenth century; though not technically criminal, its harshness was recognized. W.J. Jones, *The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period*, 69 TRANSACTIONS AM. PHIL. SOC'Y 1, 13-14 (1979). Under a seventeenth-century statute, bankrupts unable to show blameless loss were liable to pillorying and mutilation. 21 Jam. 1, ch. 19 (1623) (Eng.). Debtors who concealed property while taking advantage of bankruptcy relief could be hanged under eighteenth century statutes. 4 Anne ch. 17 (1705) (Eng.); 5 Geo. 2, ch. 30 (1732) (Eng.). Adam Smith reported that "many have been since executed" under bankruptcy law, and he defended the "great justice" of this practice. ADAM SMITH, LECTURES ON JURISPRUDENCE 131-32 (R.L. Meek et al. eds., 1978) (ms. 1762-66); cf. Jones, *supra*, at 50 & n.109 (suggesting that executions were few); see also *id.* at 12. For additional historical background in this regard, see HENRY S. MAINE, ANCIENT LAW 267 (1920); Frank R. Kennedy, *Reflections on the Bankruptcy Laws of the United States: The Debtor's Fresh Start*, 76 W. VA. L. REV. 427, 428-34 (1974).

166. DANIEL DEFOE, AN ESSAY UPON PROJECTS (1697), quoted in Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 7-9 (1986); cf. 2 MILL, *supra* note 100, bk. 5, ch. 9, § 8 (acknowledging that some defaulters are morally blameless but suggesting that default is *prima facie* evidence of wrongful conduct). For historical discussions of this conceptual dichotomy, see JULIAN HOPBIT, RISK AND FAILURE IN ENGLISH BUSINESS, 1700-1800, at 19-28 (1987); Jones, *supra* note 165, at 9, 51-61. Similarly in America, "[w]e find in the conduct of debt-

ical span, lending came to be recognized as a business,<sup>167</sup> and the creditor's voluntary and self-interested decision to part with his property was in due course distinguished from the involuntary transfer of his property through criminal wrongdoing.<sup>168</sup> Visions of the creditor as a professional risk-taker tended to undermine the whole moral framework of the lending transaction and rendered more tepid the indignation occasioned by debtor default.

The upshot is that moral analysis of debtor behavior is today steeped in ambiguity.<sup>169</sup> In general, those advocates who continue to posit a moral obligation to repay debts nonetheless are prepared to acknowledge countervailing moral imperatives sufficient to justify the discharge; sympathy for the "honest but unfortunate" debtor,<sup>170</sup> cou-

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ors every moral shade, from gross fraud to the slightest negligence and entire innocence." Jones, *supra* note 165, at 57-58 (quoting AMERICAN JURIST 11 (1834)). The conception of the debtor as (potentially) a morally innocent party initially applied only to those who borrowed venture capital, and early discharge legislation accordingly was confined to merchants, "for the law holds it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value." 2 BLACKSTONE, *supra* note 88, at \*473-74; see also 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 236 (Alfred A. Knopf 1946) (1840); MCCOY, *supra* note 4, at 179-80. Only in this century have consumers also come to be accepted as potential victims of economic forces beyond their control and hence as deserving of debtor relief. For historical discussions, see Ian P.H. Duffy, *English Bankrupts, 1571-1861*, 24 AM. J. L. HIST. 283 (1980); Haagen, *supra* note 88, at 108-12; Hallinan, *supra* note 87, at 56-57, 65-69. Even today, however, vestiges of the old moral bias against consumers survive in the Code. See 11 U.S.C. § 707(b) (1988) (restricting dismissal on grounds of "substantial abuse" to consumer debtors).

167. On this evolving conception in America, see WOOD, *supra* note 35, at 139-40.

168. As William Godwin observed:

It is in vain that the whole multitude of moralists assure us, that the sum I owe to another man is as little to be infringed upon, as the wealth of which he is in possession. Everyone feels the fallacy of this maxim. . . . When [the debtor] ultimately fails of payment, the mischief he produces is real, but is not so great, at least in ordinary cases, as that which attends upon robbery.

WILLIAM GODWIN, ENQUIRY CONCERNING POLITICAL JUSTICE (1795), quoted in P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 109 (1979). Adam Smith agreed:

It is a common saying, that he who does not pay me what he owes me, does me as great an injury as he who takes as much from me by theft or robbery. It is very true the loss is as great, but we do not naturally [look] upon the injury as at all so heinous. . . . The spectator can not think he has so good a ground for expectation of the possessing it.

SMITH, *supra* note 165, at 87.

169. The resulting moral ambiguity and ambivalence is also reflected in popular culture. See *supra* notes 41-43 and accompanying text. For a further Kantian perspective on the problem, see IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 18-19, 39-40, 47-48 (Lewis W. Beck trans., Liberal Arts Press 1959) (1785).

170. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); Brown v. Felson, 442 U.S. 127, 128 (1979). This qualifying phrase was a staple of bankruptcy discussions from at least the

pled with a concern for basic human dignity, call for the grant of a fresh start.<sup>171</sup> But those same advocates would not hesitate to penalize a debtor who has behaved dishonestly, or who by design has brought her condition upon herself.<sup>172</sup> The question that then arises is whether the conscious decision to *plan* for bankruptcy so soils the debtor's hands as to defeat her moral claim to relief. And that, at least in the present context, is a question of degree<sup>173</sup> on which it may be difficult to forge a consensus.<sup>174</sup> The fact that few creditors will have *relied* on the expectancies that planning protects (Weinstein's

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eighteenth century. *E.g.*, WARREN, *supra* note 87, at 17; Coles, *supra* note 97, at 297; Howard, *supra* note 89, at 1050 n.24.

171. *E.g.*, John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355, 369-70 (1986); Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 531-43, 565-74 (1991); Hallinan, *supra* note 87, at 138-43; for a related discussion, see Philip Shuchman, *An Attempt at a "Philosophy of Bankruptcy"*, 21 UCLA L. REV. 403, 449-54 (1973); suggesting that the issue remains morally ambiguous, see SULLIVAN ET AL., *supra* note 36, at 341. For early criticisms of discharge legislation on the ground that it undermined the moral sanctity of the debtor-creditor relation, see Ogden v. Saunders, 14 U.S. (1 Wheat.) 213, 355-56 (1827); COLEMAN, *supra* note 87, at 128.

Modern recognition of a moral obligation to pay debts despite the right of discharge can be found in the reaffirmation doctrine. Under this American doctrine (which originated in Great Britain but has since been abolished by the canny English), a gratuitous reaffirmation of a discharged debt binds the debtor on the theory that the original obligation to satisfy the debt furnishes a present "moral consideration" for the promise. *See generally* Douglas G. Boshkoff, *The Bankrupt's Moral Obligation to Pay His Discharged Debts: A Conflict Between Contract Theory and Bankruptcy Policy*, 47 IND. L.J. 36 (1971). Professor Boshkoff dismissed this reasoning, however, as "slick verbalization." *Id.* at 62.

172. Flint, *supra* note 171, at 540-41, 554 (asserting that the debtor's moral claim to relief is premised upon a "covenant" between the debtor and society that requires "a certain level of fair dealing on the part of the debtor"); Howard, *supra* note 89, at 1050-56; Philip Shuchman, *The Fraud Exception in Consumer Bankruptcy*, 23 STAN. L. REV. 735, 738-39 (1971). *But see* Charles J. Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability of Debt*, 59 GEO. WASH. L. REV. 56, 95-99 (1990) ("[W]ho cares if debtors take advantage of the discharge law? If letting people who are hopelessly in debt regain their sense of self-worth and identity through debt forgiveness is justifiable on a humanitarian basis, the justification remains valid whether the debtor is a commercial Mother Theresa (*sic*) or Saddam Hussein.").

173. As one court has put it, the debtor's decision strategically to time her bankruptcy "might not accord with the highest standards of ethics. But, for that matter, the very act of bankruptcy—repudiation of one's debts—may be considered unethical by persons of high moral sensibility." *In re Cummings*, 84 F. Supp. 65, 71 (S.D. Cal. 1949); *see also* Coles, *supra* note 97, at 297 (suggesting that the debtor's conduct may fall into a "twilight zone").

174. Assuming ethical consensus is ever possible. On this problem, *see* (or rather savor) Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229. For discussions suggesting the lack of a consensus on the morality of bankruptcy planning generally, *see* Ayer, *supra* note 171, at 373-74; Howard, *supra* note 89, at 1054-57; Raymond T. Nimmer, *Consumer Bankruptcy Abuse*, LAW & CONTEMP. PROBS., Spring 1987, at 89, 91.

contrary assertion notwithstanding<sup>175</sup>) would at least appear to weaken moral criticism of the debtor in such a case.<sup>176</sup>

At any rate, other theorists today downplay or even deny the debtor's moral obligation to lenders in connection with the modern market for consumer credit.<sup>177</sup> In that context, the debtor-creditor relation may be conceived simply as an arm's length bargain between economic actors whose entitlements and expectations are shaped by nothing other than the agreement and its legal background.<sup>178</sup> At that point, we are left to ponder whether bankruptcy planning runs afoul not of ethical precepts, but of public policy. And the answer to that, as usual, is a resounding Yes and No. Of course, we *want* persons to plan their affairs in light of the law; influencing conduct is, after all, what law is about. But at the same time, we do not want persons to plan their affairs *around* the law. The trick (fiendishly difficult to carry off) is to implement rules that encourage only those modifications of social conduct that accord with lawmakers' intentions.<sup>179</sup>

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175. See *supra* notes 33-39 and accompanying text.

176. Furthermore, the debtor arguably has a moral obligation to her *benefactor* to plan for bankruptcy. See *infra* text following note 205.

177. Including me; see Hirsch, *supra* note 25, at 610-11; for weightier discussions, see Hallinan, *supra* note 87, at 140-41; Doug Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 725-26 (1980); Shuchman, *supra* note 171, at 428-32, 444-49, 451-52. Some thinkers have even argued that because of their relative sophistication, *creditors* have a primary moral obligation when operating in the modern consumer market not to lend aggressively or improvidently; if they nonetheless do so, it is *creditors* who bear moral responsibility when their debtors default. Ayer, *supra* note 171, at 369; Vern Countryman, *Improvident Credit Extension: A New Legal Concept Aborning?*, 27 ME. L. REV. 1, 2-7 (1975); Gross, *Fresh Start*, *supra* note 90, at 102; Hallinan, *supra* note 87, at 67-68. Countryman hinted at the idea in an earlier essay, Vern Countryman, *The Bankruptcy Boom*, 77 HARV. L. REV. 1452, 1458-60 (1964); for an early English anticipation, see Haagen, *supra* note 88, at 110-11 (citing "A Dissertation on Credit" (c. 1750)). Some debtors, not surprisingly, have voiced agreement with this claim. *In re Goodson*, 130 B.R. 897, 903 (Bankr. N.D. Okl. 1991).

178. One might posit alternatively that persons do have moral obligations when they act in a commercial environment, but that those moral obligations are shaped by the terms of the bargain and its legal context. See DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986) (developing a contractarian theory of morality); see also Charles Fried, *Moral Causation*, 77 HARV. L. REV. 1258 (1964) (discussing the social benefits of such a conceptualization). Justice Holmes criticized this conceptualization, however, in Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-62 (1897) (arguing that one has no independent moral duty to fulfill contracts but simply chooses between performance and damages). Under either conceptualization, at any rate, moral analysis would have no independent significance.

179. The dilemma is concisely posed in Eisenberg, *Bankruptcy Law*, *supra* note 89, at 992; see also *Bank of Elberton v. Swift* (*In re Swift*), 268 F. 305, 307-08 (5th Cir. 1920). For a discussion of bankruptcy abuse in a related utilitarian vein, see *Chillicothe State Bank v. Carroll* (*In re Carroll*), 70 B.R. 143, 145-46 (Bankr. W.D. Mo. 1986); *In re Bruno*, 68 B.R. 101, 103-04 (Bankr. W.D. Mo. 1986). Professor Nimmer argues that the problem may be



Once rules have been thus crafted, citizens can hardly be faulted for planning, carefully or even cleverly; mere cleverness in wringing full advantage out of rules is unobjectionable when it allows citizens to take precisely what lawmakers have seen fit to give them.

In some instances, lawmakers have acted to close off avenues for planning that contradict plain objectives of bankruptcy law. Code provisions designed to deter persons from either incurring or satisfying debts in anticipation of bankruptcy fall into this category.<sup>180</sup> In other instances, authorities have quarreled over the purposes of specific rules and hence have disputed the boundaries of their abuse. Eve-of-bankruptcy conversions of nonexempt into exempt property offer a good example. Some courts and commentators charge that such planning frustrates bankruptcy policy, by allowing debtors to retain property they had no use for prior to bankruptcy and that they will (presumably) liquidate back into cash as soon as the coast is clear. But other courts and commentators maintain that planning of this sort fulfills bankruptcy policy, by providing debtors with a minimum stock of assets with which to make a fresh start. When a debtor converts nonexempt property into exempt forms, one could argue, she is simply "mak[ing] full use of the exemptions to which [s]he is entitled under the law," and which lawmakers *want her to have*.<sup>181</sup> Until lawmakers define more precisely the rationale for excepting a set bundle of assets from creditor levy, the substantive utility of exemption planning (whatever its superficial moral appearance) must remain ambiguous.<sup>182</sup>

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self-correcting, to the extent that persons are subject to extralegal social pressures not to abuse rules. Nimmer, *supra* note 174, at 95; see also DAVID LUBAN, *LAWYERS AND JUSTICE* 47-49 (1988) (discussing generally the problem of legal loopholes).

180. 11 U.S.C. §§ 523(a)(2)(C), 547(b) (1988); see also 11 U.S.C. § 546(c) (1988). Since the discharge of debt is not premised on a public policy in favor of nonenforcement of contracts for credit, but rather on a public policy in favor of social cost avoidance that *outweighs* the utility of contract enforcement, debtors contravene the purpose of bankruptcy law when they borrow only because they anticipate being discharged from their obligation to repay. Section 523(a)(2)(C) operates to deter debtors from this form of bankruptcy planning. For a criticism of this provision, see Jeffrey W. Morris, *Substantive Consumer Bankruptcy Reform in the Bankruptcy Amendments Act of 1984*, 27 WM. & MARY L. REV. 91, 128-32 (1985); for an examination of this sort of planning, see Barry L. Zaretsky, *The Fraud Exception to Discharge Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 253, 256-58 (1979). On the public policy against satisfaction of debts in anticipation of bankruptcy (*i.e.*, preferences), see JACKSON, *supra* note 25, at 122-50.

181. BANKRUPTCY REFORM ACT OF 1978, S. REP. NO. 989, 95th Cong., 2d Sess. 76 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5862; JACKSON, *supra* note 25, at 275 n.44 (doubting this statement's interpretative relevance).

182. For discussions, compare Eisenberg, *Bankruptcy Law*, *supra* note 89, at 993-96; Eisenberg, *A Rejoinder*, *supra* note 90, at 620-21; Marshall D. Gringauz, *Recent Develop-*

Now, let us contemplate in this light the debtor's decision to time strategically her bankruptcy petition in order to enhance her prospects for the accumulation of future assets. Is this sort of manipulation of the date of cleavage contrary to public policy? The answer would appear to hinge on the character and magnitude of the prospect in question. Consider wages. A debtor may plan her bankruptcy to precede a particularly lucrative employment opportunity. If she does so, is she committing an abuse? Not at all: The very purpose of the discharge is to ensure that debtors have an incentive to take up employment. Only if the activity were so lucrative relative to the earner's debt load that she had this incentive anyway, without the right of discharge, would her decision to enter bankruptcy prior to the employment conflict with the law's purpose.<sup>183</sup> While the Code fails to face this problem head on, one of its provisions does function to prevent this kind of planning. Debtors are barred from timing bankruptcy to discharge their student loans prior to launching their productive careers.<sup>184</sup> Presumably, students (at least members of the "me" generation) would not embark on a costly course of study unless the income stream down the road justified the investment. Denying them the discharge will hardly deter graduates from pursuing the occupations their loans have

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ment, *Section 522 Exemptions: A Look at the Individual Debtor's Reduction of the Bankruptcy Estate*, 5 BANKR. DEV. J. 131, 142-48 (1988); Harris, *supra* note 90, at 339-44; Georgianne L. Huckfeldt, Note, *Conversion of Nonexempt Assets to Exempt Assets Prior to Bankruptcy—A Question of Fraud?*, 56 MO. L. REV. 857, 867-68 (1991); Matthew J. Kemner, Comment, *Personal Bankruptcy Discharge and the Myth of the Unchecked Homestead Exemption*, 56 MO. L. REV. 683, 684-85 (1991); JACKSON, *supra* note 25, at 275-78; Frank W. Koger & Sheryl A. Reynolds, *Is Prefiling Engineering Prudent Planning or Section 727 Fraud? (Or, When Does a Pig Become a Hog?)*, 93 COM. L.J. 465 (1988); Alan N. Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 RUTGERS L. REV. 615, 627-29 (1978); Kevin A. Shacter, Recent Development, *Bankruptcy Estate Planning: Grounds for Denial of Discharge Under Section 727(a)(2)(A)*, 7 BANKR. DEV. J. 199 (1990).

183. Payments in satisfaction of debts can be analogized to taxation. If a tax is sufficiently small it will not deter productive activity, and can even encourage it. See *supra* note 99. Some courts, it may be observed, have also described the decision to enter bankruptcy under these conditions as morally offensive. *In re Kahn*, 35 B.R. 718, 719-20 (Bankr. W.D. Ky. 1984); *In re Peluso*, 72 B.R. 732, 737 (Bankr. D. Kan. 1987); *In re Bell*, 56 B.R. 637, 643 (Bankr. E.D. Mich. 1986); *infra* note 187; see also *In re Arnold*, 869 F.2d 240, 243 (4th Cir. 1989) (affirming modification of wage-earner plan after debtor substantially increased his income on grounds of fairness, "[e]ven if the prospect of higher Chapter 13 payments were to discourage some debtors from working to improve their income," while observing that the modification ordered should have no such effect).

184. 11 U.S.C. § 523(a)(8) (1988 & Supp. II 1990) provides that student loans made, insured, or guaranteed by government are not dischargeable unless they first became due seven years earlier, or unless excepting such loans from discharge will cause "undue hardship."

enabled them to enter.<sup>185</sup> The bankruptcy court's right to dismiss consumer debtors' petitions sua sponte on grounds of "substantial abuse"<sup>186</sup> has likewise been applied to bar discharge when it is unnecessary to preserve debtors' incentives to grasp economic opportunities.<sup>187</sup>

185. For a different interpretation of this provision, for which there is little substantive legislative history, see JACKSON, *supra* note 25, at 250-52, 256 & n.5; see also H.R. DOC. NO. 137, *supra* note 22, pt. 2, at 140; Janice E. Kosel, *Running the Gauntlet of "Undue Hardship"—the Discharge of Student Loans in Bankruptcy*, 11 GOLDEN GATE U. L. REV. 457 (1981); Brian C. Fries, Comment, *Recent Amendments to the Bankruptcy Code—A Politically Motivated Less Fresh Start?*, 56 MO. L. REV. 705, 707-13 (1991); Kurt Weiss, Note, *Discharging Student Loans in Bankruptcy: the Bankruptcy Court Tests of "Undue Hardship"*, 26 ARIZ. L. REV. 445 (1984).

186. 11 U.S.C. § 707(b) (1988).

187. As one court observed:

It is well established that the provisions of Chapter 7 were intended to afford relief to a debtor when he finds himself in financial circumstances which threaten his immediate well-being. If a debtor has the ability to repay all or a substantial portion of his debts within a reasonable time, while at the same time maintaining a reasonable standard of living, then he cannot be so financially destitute that his immediate welfare is in question. In the absence of such jeopardy, it is morally and legally unconscionable that a person should be able to extinguish his obligations without first making a reasonable effort to fulfill them.

*In re Hudson*, 56 B.R. 415, 419 (Bankr. N.D. Ohio 1985) (citation omitted), *modified*, 64 B.R. 73 (Bankr. N.D. Ohio 1986). For similar statements, see, for example, *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989); *In re Strong*, 84 B.R. 541, 544 (Bankr. N.D. Ind. 1988); *In re Cord*, 68 B.R. 5, 6-7 (Bankr. W.D. Mo. 1986); *In re Grant*, 51 B.R. 385, 392 (Bankr. N.D. Ohio 1985).

In this regard, courts have examined with an extra ounce of skepticism (better than a pound of cure?) the petitions of *doctors* for bankruptcy relief. "[D]octors may be slow [to] pay but always eventually pay because they all become rich . . ." *In re Campbell*, 63 B.R. 702, 703 (Bankr. W.D. Mo. 1986); see also, e.g., *In re Khan*, 35 B.R. 718 (Bankr. W.D. Ky. 1984); *In re Traub*, 140 B.R. 286 (Bankr. D.N.M. 1992). Courts have differed, however, in their definitions of the indicia of "substantial abuse." For a recent discussion of the conflicting case law, see *In re Nolan*, 140 B.R. 797, 801-02 (Bankr. D. Colo. 1992). For scholarly discussions, see Wayne R. Wells & Janell M. Kurtz, *A Critical Analysis of Bankruptcy Code Section 707(b)*, 36 CLEV. ST. L. REV. 385 (1988); Irving A. Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of "Substantial Abuse"*, Part 1, 59 AM. BANKR. L.J. 327 (1985); Irving A. Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of "Substantial Abuse"*, Part 2, 60 AM. BANKR. L.J. 33 (1986) [hereinafter Breitowitz, *Part 2*]; Gross, *Fresh Start*, *supra* note 90, at 88-114; Nimmer, *supra* note 174, at 96-99; Andrea M. Proia, *The Interpretation and Application of Section 707(b) of the Bankruptcy Code*, 93 COM. L.J. 367 (1988); David L. Balser, Note, *Section 707(b) of the Bankruptcy Code: A Roadmap with a Proposed Standard for Defining Substantial Abuse*, 19 J. L. REFORM 1011 (1986); Robert M. Thompson, Note, *Consumer Bankruptcy: Substantial Abuse and Section 707 of the Bankruptcy Code*, 55 MO. L. REV. 247 (1990); Wayne R. Wells et al., *The Implementation of Bankruptcy Code Section 707(b): The Law and the Reality*, 39 CLEV. ST. L. REV. 15 (1991); Benjamin S. Zacks, Comment, *Bankruptcy, Chapter 7 Dismissal Section 707(b); The Impact Upon the Consumer Creditor, the Bankrupt, and the Court. Proposals for the Future*, 16 CAP. U. L. REV. 547 (1987).

This analysis nonetheless appears inapposite to expectancies. However glittering a beneficiary's inheritance prospects may appear relative to her debts, no amount of reciprocation can ensure that they will ultimately mature, since they are not *formally* premised on an economic exchange.<sup>188</sup> Accordingly, the debtor's incentive (or lack thereof) to go on providing social services in the face of insolvency is ultimately beside the point. Creditors should not expect to gain from denial of discharge to a beneficiary because, to forestall that very eventuality, the benefactor could disinherit her.<sup>189</sup> When a debtor intentionally accelerates her petition in order to protect an expectancy from which creditors could not dependably benefit, her action would not appear to be abusive.<sup>190</sup>

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188. See *supra* text accompanying note 139. This theoretical distinction is a fiction which is interesting in its own right. See Hirsch & Wang, *supra* note 97, at 9-10 & n.31. While courts in general abide by the fiction, in some instances they do not. Where there was at least an informal understanding that a gift was premised on the subsequent reciprocal provision of social services, some courts have treated the transactions as contracts and have ordered restitution when the services were not forthcoming. MCGOVERN ET AL., *supra* note 24, § 5.5, at 224.

189. Once again, however, the distinction between earnings and expectancies in this regard may be blurry: The debtor *herself* may withhold her labor, not because it is in her interest to do so, but in order to spite her creditors if she is denied safe passage into bankruptcy liquidation. This psychological fact may undermine the entire premise that 11 U.S.C. § 707(b) (1988) can be used to benefit creditors. For discussions, compare Boshkoff, *supra* note 20, at 116, 123 (discussing the idea of involuntary bankruptcy and noting that an unwilling bankrupt is less likely to remain employed or cooperate); Breitowitz, *Part 2*, *supra* note 187, at 66-67 (arguing that to assume dismissal of Chapter 7 will benefit creditors "ignores the basic psychological fact that if all of the debtor's disposable income must be applied to . . . debt" the income will decrease); Eisenberg, *Bankruptcy Law*, *supra* note 89, at 987, 989 (refuting objections to involuntary Chapter 13 filing and noting that noncooperation motivated by spite is rendered unlikely by threatening the debtor with denial of discharge); Harris, *supra* note 90, at 360 (responding to Eisenberg by stating that debtor cooperation is difficult and potentially expensive to coerce, and that denying discharge undermines the fresh start); Howard, *supra* note 89, at 1084-85 (arguing that mandatory Chapter 13 is not logical because, among other things, debtor willingness is key to a successful Chapter 13 plan); Lynn M. LoPucki, "Encouraging" Repayment Under Chapter 13 of the Bankruptcy Code, 18 HARV. J. ON LEGIS. 347, 381 (1981) (stating that involuntary Chapter 13 will lead to debtor flight).

190. Compare *Bank of Elberton v. Swift* (*In re Swift*), 268 F. 305, 307-08 (5th Cir. 1920), where

[i]t was not denied that a party might take advantage of a voluntary proceeding in bankruptcy for the very purpose of having any property he might accumulate thereafter relieved from his debts, but it was said that there must be a line drawn between a general purpose of that kind and a specific intent, such as is alleged to exist here, where the acquisition of the property . . . followed so closely in time upon the filing of the petition.

But compare *In re Restea*, 76 B.R. 728, 735 (Bankr. D.S.D. 1987), where the bankruptcy court declined to invoke § 707(b) against a debtor whose prospects for future income were

A distinction must again be drawn, however, between "true" expectancies and those that are virtually future interests. If a benefactor is effectively incapable of altering his estate plan, then the debtor's manipulation of the date of her petition could indeed damage the interests of creditors.<sup>191</sup> Furthermore, the debtor's decision to file her petition on one day or another will have no impact on her incentive to gratify the benefactor under these conditions. Unlike expectancies, a future interest has already been "earned." Because this sort of planning fails to advance discharge policy, it could reasonably be deemed abusive.<sup>192</sup> But abuse of this kind could be dealt with more precisely by redefining functionally irrevocable expectancies as future interests,<sup>193</sup> or simply by exerting the bankruptcy court's existing power to dismiss petitions for "substantial abuse" in such cases.<sup>194</sup> Either ap-

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"at best, highly speculative." *But see In re Lybrook*, 951 F.2d 136, 138 (7th Cir. 1991) (discussed *infra* note 194).

191. *But see supra* text accompanying note 145. Canadian courts have applied this distinction, suspending the discharge only of those debtors for whom inheritance "is a real probability in the sense that the bankrupt can almost be assured of receiving moneys from the estate." *Re Baker*, 63 C.B.R. (new ser.) 21, 23 (Ont. 1987); *see also In re Stafford*, 37 C.B.R. (old ser.) 206, 208 (Ont. 1959).

192. Timing a petition to protect even an assured inheritance could still be deemed in accord with public policy if we were to posit that expected inheritances comprise a necessary support mechanism in the economic life cycle of individuals and hence a mechanism debtors ought to be allowed to take measures to protect. *Cf. In re Thompson*, 4 B.R. 18, 21 (Bankr. D. Me. 1979) (holding the debtor's timing of his petition to protect a workmen's compensation claim nonabusive, because the claim is a means of future support for the disabled worker). On the importance of expectancies as a means of life cycle support, substituting for what would otherwise have to be state support, see MARVIN B. SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* 1-3, 310-14 (1970); John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 729-39 (1988) (discussing the importance of family wealth transfers as a source of human capital). On the other hand, if expectancies were in fact generally so perceived, then presumably they would be declared exempt under state law, which—apart from homesteads and personal property set-asides—they are not. *Cf. Patterson v. Shumate*, 112 S. Ct. 2242, 2249-50 (1992) (noting the public policy in favor of giving exempt status to pension benefits).

193. *See supra* note 147.

194. 11 U.S.C. § 707(b) (1988). For an assertion that it would be appropriate to deny a petition under § 707(b) when a debtor expected an inheritance sufficient to pay off her debts, *see In re Lybrook*, 951 F.2d 136, 138 (7th Cir. 1991) (*dicta*) (Posner, J.); *see also* H.R. Doc. No. 137, *supra* note 22, pt. 2, at 140. It may be observed that flexible rules for the denial or delay of discharge, structurally akin to § 707(b), exist under the bankruptcy law of Great Britain and were early advocated in the United States to deal, *inter alia*, with inheritance planning. *See supra* note 20. Some commentators have opposed the British system of discharge—and by the same token § 707(b)—as being *too* flexible, allowing for the application of capricious standards of denial. For early criticisms on this ground, *see* Notes on Bankruptcy Conference, Washington, D.C. (Apr. 29-May 2, 1932), in MacLachlan Papers, *supra* note 30, ms. box 2, folder 1, at 10 (criticizing the Hastings-Michener Bill); Coles, *supra* note 97, at 297, 350 (criticizing the Thatcher-Garrison Report). For modern discussions, compare MACLACHLAN, *supra* note 20, § 122; Boshkoff, *supra* note 20, at 118-

proach would permit debtors to avail themselves of true expectancies, while at the same time deterring another (far more gruesome) form of planning that remains possible under the prevailing six-month window: manipulation not of the timing of the petition, but rather of the date of the benefactor's death.<sup>195</sup> When considered from the standpoint of abuse theory, the sole virtue of the Code's present treatment of expectancies is administrative efficiency.<sup>196</sup>

### III. An Alternative Perspective: The Theory of Intent

There remains one final vantage point from which we may survey the instant problem, a vantage point overlooked by the drafters themselves, but one that could have enabled them to perceive all expectancies, *including even those that are functionally irrevocable*, as meriting legal protection by way of planned petitions. For if we turn once more to inheritance theory, we find that the touchstone of probate law, its *leitmotif* endlessly repeated in the case law and treatises on the subject, is *the effectuation of testamentary intent*.<sup>197</sup> By guaranteeing as a matter of public policy that a benefactor's last wishes concerning the disposition of his property will be respected, probate law operates to spur him throughout his life to produce more wealth and to save more

25; Breitowitz, *Part 2, supra* note 187, at 67; Countryman, *Bankruptcy and the Individual Debtor, supra* note 83, at 820-21, 827; Eisenberg, *A Rejoinder, supra* note 90, at 625-26; Harris, *supra* note 90, at 353-56; Nimmer, *supra* note 174, at 92. On the other hand, so long as § 707(b) is applied strictly to those cases where a functionally irrevocable expectancy has not yet vested, courts would have to make no ad hoc value judgments on the issue of abuse.

195. For a case noting the possibility that debtors may manipulate the date of a benefactor's death under the current six-month window by prolonging life support, see *Caso v. Bentley (In re Bentley)*, 120 B.R. 712, 715 n.4 (Bankr. S.D.N.Y. 1990). (Some persons, however, take steps to provide their own advance directives concerning the continuation or termination of their medical treatment, enforceable in most jurisdictions as a "living will.") Surely, *creditors* would have no standing to petition for *termination* of life support under these conditions, but the mind reels at the possibilities.

196. Apart from connoting conscious planning, a petition filed when the debtor's benefactor is near death could also imply (at least more often than not) that the benefactor by then lacks legal or functional capacity. Thus, along with its limitation to testamentary transfers, the fact that § 541(a)(5) is limited to a short time span suggests that its drafters were mainly concerned with reaching gratuitous transfers by the incapacitated. See Harris, *supra* note 90, at 357-60 (noting as a general matter the administrative burden of a case-by-case enquiry into bankruptcy abuse).

197. "[T]he intention of the testator is admitted to be the pole star by which the courts must steer." 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*537 (1860). This phrase has echoed through the case law. *E.g.*, *Biles v. Martin*, 259 So. 2d 258, 262 (Ala. 1972); *Conlee v. Conlee*, 190 S.W.2d 43, 46 (Ky. 1945). See UNIF. PROBATE CODE § 1-102(b)(2), art. 2, prefatory note (1991). For an early counterexample, see *Reed v. Roberts*, 26 Ga. 294, 300-01 (1858).

of the wealth he produces.<sup>198</sup> To be sure, this policy is not immune to criticism,<sup>199</sup> and it is hedged about with certain limitations,<sup>200</sup> but as a general principle its acceptance within the field of inheritance law and theory is undoubted.

Putting to one side the relation of debtors and creditors, and focusing instead on the intentions of benefactors, how would we expect a benefactor to react if his beneficiary fell into insolvency? So long as an indebted beneficiary were not *hopelessly* insolvent, it would be wrong to assume that her benefactor would invariably wish to disinherit her. If the beneficiary planned eventually to satisfy her creditors, the benefactor's bequest could speed that effort, freeing up the beneficiary's future earnings and thereby indirectly facilitating consumption. Alternatively, if the beneficiary were tottering on the brink of default, the benefactor might desire to bequeath specifically to forestall a bankruptcy proceeding and thereby to preserve the beneficiary's financial reputation. In these circumstances, we cannot predict the benefactor's wishes with any degree of confidence.<sup>201</sup>

But once the die is cast and default becomes inevitable, irrespective of inheritance, we may safely assume that no benefactor would want his accumulated wealth to flow into the debtor's bankruptcy estate. The stigma of the proceeding would now be impossible to avoid; and the advantage to the beneficiary of filling up the bankruptcy estate would be nil, for she would obtain the same discharge whether her creditors received five or ten cents on the dollar.<sup>202</sup> To bequeath to a beneficiary in or en route to a bankruptcy proceeding would thus be pointless—throwing good money, so to say, after bad debts.<sup>203</sup>

Given these verities, we can readily anticipate (and already

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198. See Hirsch & Wang, *supra* note 97, at 7-8 & n.25, 37-38 & n.146.

199. *Id.* at 8-9, 38 n.147.

200. See generally Friedman, *supra* note 113 (discussing the tension between intent effectuation and other public policies).

201. See Hirsch, *supra* note 25, at 632, 635-36.

202. Likewise, a composition agreement conducted under state law would result in a contractual right of "discharge" for the defaulting debtor. MACLACHLAN, *supra* note 20, § 7, at 4.

203. Paying in full specific debts after bankruptcy may be in the interest of a debtor who seeks a continuing relationship with those specific creditors. Thus, debtors who receive a discharge often reaffirm individual debts. On strategic repayment and reaffirmation, see STANLEY & GIRTH, *supra* note 36, at 59-62; Boshkoff, *supra* note 171, at 37; Rea, *supra* note 89, at 205. On the other hand, the benefit to the debtor in ensuring that *all* creditors receive somewhat greater satisfaction is attenuated; nor, given the one-shot nature of a gratuitous transfer to the debtor, would it signal to creditors that the debtor is a better credit risk than she would otherwise have been perceived to be.

have<sup>204</sup>) that any competent, attentive benefactor will take precautions to withhold his wealth from a bankruptcy estate. By the same token, we can anticipate that any *incompetent* benefactor would long to do the same. Indeed, the "race with death" that some early critics found so appalling to "common decency," a "sad commentary on human nature," to quote two of them,<sup>205</sup> would almost surely have been run with the benefactor's blessing! He would gladly have stood on the sidelines, cheering the debtor on, for then he could rest easy, knowing that his life savings would not vanish into thin air. Whatever the creditors' wishes, the incompetent benefactor would certainly object to a rule calling the race off, or even to a rule requiring the debtor to win the race by a clear six months. This insight, incidentally, also throws into a different moral light the debtor's act of planning her bankruptcy to preserve an expectancy. Whatever her moral obligation to her creditors, a beneficiary arguably has a countervailing moral obligation to her *benefactor* to see to it that his imputed wishes to shelter his estate from unintended recipients are carried into effect.

Probate law has traditionally functioned to avoid similar sorts of unintended bequests. Faced with ambiguous language, a number of courts have construed testamentary trusts benefiting insolvent or bankrupt beneficiaries to include spendthrift provisions, on the compelling assumption that testators under these circumstances would have intended "to conserve the property by placing it beyond the reach of . . . creditors."<sup>206</sup> Absent ambiguity, it is ordinarily incumbent upon the benefactor to register any change of intent by executing a codicil.<sup>207</sup> But even here, courts will revise estate plans "by operation of law" in certain situations where circumstances leave little room

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204. See *supra* note 142 and accompanying text.

205. MACLACHLAN, *supra* note 20, at 179; 4A COLLIER, *supra* note 5, § 70.27, at 374 n.6; see also *supra* notes 159-160 and accompanying text.

206. Wallace v. Foxwell, 95 N.E. 985, 989 (Ill. 1911); Jones v. Harrison, 7 F.2d 461, 465 (8th Cir. 1925) (noting that "[a]ny other interpretation robs the creation of the trust of any sensible or rational purpose"), *cert. denied*, 270 U.S. 652 (1926); see Eaton v. Boston Safe Deposit & Trust Co., 240 U.S. 427 (1916) (construing an ambiguous trust for the benefit of bankrupt beneficiary as spendthrift, though on unclear grounds). *Contra In re Dudley's Estate*, 3 F.2d 832, 835 (D. Md.) (stating that specific language is necessary to create a spendthrift trust), *aff'd sub nom. Dudley v. Tucker*, 7 F.2d 118 (4th Cir. 1925); Standard Chemical Co. v. Weed, 285 N.W. 175, 176 (Iowa 1939) (same). There are no recent cases on point, but for a similar assumption found in the modern case law, see MCGOVERN ET AL., *supra* note 24, § 8.2, at 309. In four jurisdictions today, *all* trusts are construed to be spendthrift. BOGERT & BOGERT, *supra* note 24, § 222, at 416-17, 430-34, 438-40, 443-44.

207. E.g., Cook v. Equitable Life Assurance Soc'y, 428 N.E.2d 110, 115-16 (Ind. App. 1981) (refusing to recognize an unnamed beneficiary when the benefactor made no effort to formalize his intent).



for doubt as to the benefactor's wishes.<sup>208</sup>

One such circumstance is where a named beneficiary predeceases her benefactor. Since dead persons have no use for property, the benefactor almost certainly would prefer to bequeath to someone who is living. If the benefactor nonetheless failed to amend his original estate plan, we may rest assured that his inaction stemmed from inadvertence or incapacity. Accordingly, by operation of law the bequest "lapses" and instead of flowing through the probate estate of the named beneficiary it goes directly to alternative takers.<sup>209</sup> The principle of lapse could quite reasonably be extended to cover instances of financial, as well as physical, demise. In *both* situations, the beneficiary has lost her capacity to enjoy the inheritance. In *both* situations, the benefactor's preference to alter his estate plan can scarcely be gainsaid.

The apparent intention of the drafters of the Chandler Act to use the six-month window mainly to catch expectancies coming from functionally incapacitated benefactors<sup>210</sup> looks particularly odious from the perspective of inheritance theory. Probate law has traditionally shown a special solicitude for the plight of those who are physically unable to keep current their estate plans. Inheritance commentators have extolled efforts to accomplish by legal implication what the incapacitated benefactor cannot accomplish for himself.<sup>211</sup>

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208. MCGOVERN ET AL., *supra* note 24, § 5.4, at 221-23; W.A. Graunke & J.H. Beuscher, *The Doctrine of Implied Revocation of Wills By Reason of Change in Domestic Relations of the Testator*, 5 WIS. L. REV. 387 (1930); Elizabeth Durfee, *Revocation of Wills By Subsequent Change in the Condition or Circumstances of the Testator*, 40 MICH. L. REV. 406 (1942). These rules "are the product of centuries of legal experience in attempting to discern transferors' wishes." Langbein, *supra* note 24, at 1136-37. While revocation by operation of law has traditionally been restricted to specific circumstances (such as divorce), several courts have asserted a general right to modify estate plans on a case-by-case basis to accomplish the testator's probable intent. *E.g.*, *In re Estate of Branigan*, 609 A.2d 431, 435 (N.J. 1992) (permitting modification of an estate plan to effectuate tax savings); *In re Will of Case*, 585 N.Y.S.2d 1004, 1005 (Sur. 1992) (same).

209. MCGOVERN ET AL., *supra* note 24, § 10.4, at 421-24. Though the doctrine of lapse was originally premised on impossibility rather than intent, a theory of imputed intent forms its modern foundation. *Powell v. Thorsen*, 322 S.E.2d 261, 264 (Ga. 1984); PAGE, *supra* note 118, at 67-68; John O. Fox, *Estate: A Word to Be Used Cautiously, If at All*, 81 HARV. L. REV. 992, 996-97 (1968); Philip Mechem, *Some Problems Arising Under Anti-Lapse Statutes*, 19 IOWA L. REV. 1, 1 (1933).

210. See *supra* text accompanying notes 146-147.

211. See UNIF. PROBATE CODE § 2-606(b) (1991) (providing a substitute bequest to beneficiaries of property adeemed by extinction where the testator is incompetent); *id.* § 5-407(b)(3) (permitting the court or a conservator to make inter vivos gifts or create revocable inter vivos trusts on behalf of, but not otherwise to alter the will of, an incompetent person). For discussions, see Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 622-30 (1988); Rene A. Wormser, *The Doctrine of Substitution of Judgment*, in

These considerations did not entirely escape critics of the original Chandler Act reform. While the six-month window received its share of (largely perfunctory) applause,<sup>212</sup> to the extent that it was noticed at all,<sup>213</sup> a number of commentators tossed in a raspberry, questioning the rule's soundness from the standpoint of testamentary intent effectuation. One critic, who highlighted the provision as "[a] change of far-reaching consequence," even claimed that by restricting the benefactor's right to bequeath freely to the discharged debtor it undermined the "fundamental principle" of freedom of alienation of property.<sup>214</sup> Prior to the Chandler Act, several courts had also justified the immediate effectiveness of the discharge on this basis.<sup>215</sup> The drafters in 1938 either were ignorant of or affirmatively ignored these opinions.<sup>216</sup>

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9 INST. ON EST. PLAN. ch. 15 (1975). Under British law, courts have power to revise the wills of incompetent testators to reflect their probable intent in the event of any changed circumstance. 1 C.H. SHERRIN ET AL., WILLIAMS' LAW RELATING TO WILLS 33-37 (6th ed. 1987).

212. John E. Mulder, *Ambiguities in the Chandler Act*, 89 U. PA. L. REV. 10, 13 & n.19 (1940); Mitchell S. Dvoret, *Bankruptcy Under the Chandler Act: Analysis*, 27 GEO. L.J. 599, 609-10 (1939); Gage, *supra* note 151, at 398; *Report No. 1916*, *supra* note 33, at 210-11. The drafters themselves were also charmed by their work product. *Symposium: Chandler Bankruptcy Modernization Act*, 13 J. NAT'L ASS'N REF. BANKR. 8, 25 (1938).

213. Most of the commentary on the Chandler Act simply ignored the new provision. For a thorough bibliography, see 1 COLLIER, *supra* note 5, § 0.07, at 17-18 n.1.

214. Levi H. David, *An Analysis of the New Chandler Bankruptcy Act*, A1 CORP. REORG. & AM. BANKR. REV. 497, 508 (1938) (quote); A. Grant Walker, *The Chandler Bankruptcy Act—An Address*, A2 CORP. REORG. & AM. BANKR. REV. 43 (1938); see SAMUEL C. DUBERSTEIN, SOME IMPORTANT CHANGES IN THE BANKRUPTCY LAW AS AFFECTED BY THE CHANDLER ACT 29 (n.d.) (c. 1938) (describing the scenario of a bequest captured by a bankruptcy estate as "a very unfortunate situation"); Jacob Lashly, *The Chandler Bill*, 23 VA. L. REV. 880, 896-97 (1937) (criticizing the six-month window as interfering with the unconditional discharge).

215. *In re Woods*, 133 F. 82, 83 (D. Pa. 1904); *In re Lage*, 19 F.2d 153, 154-55 (N.D. Iowa 1927).

216. In his bankruptcy treatise, Professor MacLachlan responded to the argument, insisting that it was wrong to assume that benefactors would invariably prefer to shelter their bequests from a bankruptcy estate. "Some ancestors believe in having debts paid as a matter of principle, and may side with the creditor as against an improvident heir." MAC-LACHLAN, *supra* note 20, at 178. Such "old-time conscientiousness," to quote an old-time judge, is hardly to be anticipated in this day and age. *Daniel v. Frost*, 62 Ga. 697, 705-06 (1879) (Bleckley, J.). Compare the discussion in *Lage*:

I think it universally recognized that one of the principal considerations that control parents in the testamentary disposition of their property is a desire to bestow their bounty upon their offspring. . . . Disposition by will at death is in its nature inconsistent with the idea that the estate or property disposed of should be seized upon and taken by creditors of the beneficiaries before ever they come into it.

19 F.2d at 155. See also *infra* note 238.

Not only does the six-month window engrafted into Section 541 disregard the implicit intent of the benefactor; under another subsection of 541, it overrides *explicit* expressions of testamentary intent. Were a benefactor to seek to anticipate the contingency of insolvency, instead of disinheriting the beneficiary outright, the bankruptcy court would deny effect to his estate plan. Under Section 541(c)(1), any property interest, *including* a legacy, that is conditioned on the beneficiary remaining solvent or staying out of bankruptcy, becomes part of the bankruptcy estate *notwithstanding* that condition.<sup>217</sup> Such a condition is void in a federal bankruptcy proceeding,<sup>218</sup> even though solvency conditions in wills have long been upheld by state probate courts.<sup>219</sup> Hence, far from respecting the wishes of benefactors, the

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217. 11 U.S.C. § 541(c)(1)(B) (1988). This provision voids solvency conditions contained within a "transfer instrument" that would otherwise provide the debtor with an interest in property under named subsections of 541, *including* (a)(5). The drafters' intention to cover testamentary instruments is thus explicit. 11 U.S.C. § 541(c)(1) (1988). The provision also covers solvency conditions created by "applicable nonbankruptcy law." *Id.* Were a state to extend its lapse statute to insolvent or bankrupt beneficiaries, such a statute would again be void in a bankruptcy proceeding by reason of federal preemption.

Section 541(c)(1)(B) of the Code "marks a distinct change from the law under the [former Bankruptcy] Act," having had no analogue therein. 4 COLLIER, *supra* note 21, § 541.22, at 541-112. Prior to the enactment of the Code, solvency conditions were effective to bar expectancies from a bankruptcy estate. *Nichols v. Eaton*, 91 U.S. 716 (1875); *Beals v. Croughwell*, 299 N.W. 638 (Neb. 1941); *Hull v. Palmer*, 140 N.Y.S. 811 (App. Div. 1913), *aff'd*, 107 N.E. 653 (N.Y. 1915), *aff'd sub nom. Hull v. Farmers' Loan & Trust Co.*, 245 U.S. 312 (1917); *Miller v. Miller*, 31 S.E.2d 844 (W. Va. 1944). Solvency conditions have always been and remain effective under British bankruptcy law. HUNTER & GRAHAM, *supra* note 20, at 281-82. Along with solvency conditions, forfeiture restraint clauses (whereby the beneficiary loses her interest in the event of voluntary or *involuntary* alienation, for example by a trustee in bankruptcy) are void under § 541(c)(1)(A), overriding in a bankruptcy proceeding conditions on the *transfer* of property of the debtor.

218. Or, more precisely, they should be void. In the one case arising under the Code thus far, however, a conditional bequest was misconstrued to be a spendthrift provision (which is effective in bankruptcy, *see infra* note 220). *Scott v. Bank One Trust Co. (In re McCombe)*, 93 B.R. 597, 598 (Bankr. S.D. Ohio 1988). In *McCombe* the trustee in bankruptcy made no allegation that the bequest was conditional, as opposed to spendthrift, and hence the court failed to address the application of § 541(c)(1)(B) to the expectancy. The failure to raise the issue appears to have resulted from poor lawyering and does not speak to the merits of the case. *See also Mann v. Kreiss (In re Kreiss)*, 58 B.R. 999, 1003 (E.D.N.Y. 1986) (suggesting in dicta that a conditional bequest would be effective in bankruptcy, without reference to § 541(c)(1)(B)). Similarly, in *In re Baldwin*, 142 B.R. 210 (Bankr. S.D. Ohio 1992), the court interpreted a forfeiture restraint clause as "intended to accomplish the same goal as a spendthrift trust" without addressing the potential application of § 541(c)(1)(A) to void the condition. *Baldwin*, 142 B.R. at 213-14.

219. *E.g., In re Ames*, 46 A. 47 (R.I. 1900); *see* Annotation, *Provision in Trust Instrument Making Solvency of Beneficiary, or Discharge of His Debts, a Condition Precedent to His Receipt of Trust Property*, 138 A.L.R. 1336 (1942); 5 PAGE, *supra* note 118, § 44.30, at 476-77. Likewise, forfeiture restraint clauses are universally valid under state law. *Id.* § 44.30, at 477-78.

drafters of the Bankruptcy Code went a step further afield, placing unprecedented obstacles along the path of will-effectuation in order (one could almost say) to dupe benefactors into swelling the bankruptcy estate. Yet, astonishing though it may seem, the same drafters were not otherwise insensitive to the interests of benefactors. If one turns from Section 541(c)(1) to (c)(2),<sup>220</sup> one discovers that spendthrift trusts are effective in bankruptcy, as under state law,<sup>221</sup> to shelter trust assets from creditors.<sup>222</sup> The reason, as baldly stated in the

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220. 11 U.S.C. § 541(c)(2) (1988).

221. Spendthrift trusts are, however, only effective to the extent that they would effectively shield the corpus from creditors under state law. *Johnson v. Fenslage* (*In re Johnson*), 724 F.2d 1138, 1140 (5th Cir. 1984) (holding that a self-settled spendthrift trust is ineffective in bankruptcy as under state law); *Putney v. May* (*In re May*), 83 B.R. 812, 814 (Bankr. M.D. Fla. 1988) (holding trust not to be spendthrift); *Reardon v. Brackett* (*In re Brackett*), 54 B.R. 57, 58 (Bankr. D.N.M. 1985) (holding that a self-settled spendthrift trust is ineffective in bankruptcy as under state law); *In re Frangos*, 132 B.R. 723, 724 (Bankr. N.D. Ohio 1991) (same); *In re Rolfe*, 34 B.R. 159, 161 (Bankr. N.D. Ill. 1983) (holding that a spendthrift trust is ineffective to the extent the beneficiary had a right of withdrawal).

222. This was also true under the former Bankruptcy Act. For cases decided under the Act, see *Hull*, 140 N.Y.S. at 811; *Allen v. Tate*, 6 F.2d 139 (8th Cir. 1925); see also 2A SCOTT, *supra* note 55, § 152.2, at 175-77; Countryman, *For a New Exemption Policy*, *supra* note 85, at 699-703; Erwin N. Griswold, *Reaching the Interest of the Beneficiary of a Spendthrift Trust*, 43 HARV. L. REV. 63, 73-78 (1929); Plumb, *supra* note 22, at 77-82, 84. One lingering issue is the extent to which the trustee in bankruptcy can reach the debtor's income stream from (if not the corpus of) a spendthrift trust for the six months following discharge under § 541(a)(5). In a case decided under the former Act, the court held that the income stream is exempt because the old § 70(a) covered expectancies that "vest" within six month, and the trust technically vested when it was created, not when the income became transferable. *Roy v. Edgar* (*In re Edgar*), 728 F.2d 1371, 1374 (11th Cir. 1984). Section 541(a)(5) substitutes the word "acquires" for "vests," and cases decided under the Code have ruled that the income from a *testamentary* spendthrift trust goes to the bankruptcy estate for six months; but because § 541(a)(5) does not pertain to inter vivos gifts, income from an inter vivos spendthrift trust is entirely exempt. *Neuton v. Danning* (*In re Neuton*), 922 F.2d 1379, 1384 & n.6 (9th Cir. 1990); *In re Newman*, 88 B.R. 191, 193 (Bankr. C.D. Ill. 1987), *rev'd*, 99 B.R. 881 (C.D. Ill. 1989), *aff'd*, 903 F.2d 1150 (7th Cir. 1990); *Harkins v. Patterson* (*In re Patterson*), 70 B.R. 124, 127 & n.8 (Bankr. W.D. Mo. 1986); *York v. Kragness* (*In re Kragness*), 58 B.R. 939, 944 (Bankr. D. Or. 1986), *and* 63 B.R. 459, 464 (Bankr. D. Or. 1986); *Togut v. Hecht* (*In re Hecht*), 54 B.R. 379, 384-85 (Bankr. S.D.N.Y. 1985), *aff'd*, 69 B.R. 290 (S.D.N.Y. 1987); *In re Hersloff*, 147 B.R. 262, 266 (Bankr. M.D. Fla. 1992); see also *Smith v. Moody* (*In re Moody*), 837 F.2d 719, 723 (5th Cir. 1988) (holding that trust income qualified as a "bequest," though the temporal character of the trust was unclear from facts presented); *In re Goulding*, 79 B.R. 874, 876 (Bankr. W.D. Mo. 1987) (same). Because ERISA pension trusts are not "bequests," income distributed from them is also excepted from the six-month window. *Mitchell v. West* (*In re West*), 81 B.R. 22, 25-26 & n.2 (Bankr. 9th Cir. 1987); see *Patterson v. Shumate*, 112 S. Ct. 2242, 2250 (1992) (holding ERISA trusts to be spendthrift under § 541(c)(2)); see also *Myler v. Arney* (*In re Arney*), 35 B.R. 668, 672 (Bankr. N.D. Ill. 1983) (holding spendthrift trust covering contingent remainder effective in bankruptcy). For a criticism of the now-standard interpretation of § 541(a)(5) as applying to income from a testamentary spendthrift trust, see *Pitts*, *supra* note 13, at 77-80.

legislative history, is that "the bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the *settlor* of the trust."<sup>223</sup> And laboring in this vineyard, at least, courts have remained free to construe ambiguous trusts in favor of debtor protection, even in a bankruptcy proceeding.<sup>224</sup>

Thus illuminated, the juxtaposition of subsections (c)(1) and (c)(2) is little short of remarkable. The first provision voids explicit expressions of intent that are uncontroversial outside of bankruptcy. The second validates explicit or even implicit expressions of intent that have aroused far greater controversy, because spendthrift trusts permit debtors both to avoid satisfying creditors and to *keep* their property.<sup>225</sup> That two provisions so gratingly out of harmony should coexist, not just within the same code, not just within the same *section* of a code, but within the same *subsection* of a code, illustrates vividly the extent to which lawmakers are capable of *uncoordinating* their efforts. Here is a case of tunnel vision in the extreme.<sup>226</sup>

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Discretionary trusts are also excepted from the bankruptcy estate. *Morrow v. Apple*, 26 F.2d 543, 544 (D.C. Cir. 1928); *Farmers Coop. Co. v. Timken State Bank (In re Pechanec)*, 59 B.R. 899, 905 (Bankr. D. Kan. 1986); *Brown v. Lumbert*, 108 N.E. 1079, 1080 (Mass. 1915); *In re Esterson*, 150 B.R. 72, 73 (Bankr. M.D. Fla. 1993); *Plumb*, *supra* note 22, at 85.

223. H.R. REP. NO. 595, *supra* note 13, at 176 (emphasis added). This congressional sentiment echoes earlier judicial rationales for upholding the validity of spendthrift trusts. *E.g.*, *James v. Harrison*, 7 F.2d 461, 466 (8th Cir. 1925) (holding that the property owner "has the right to bestow it with such restrictions as he sees fit"), *cert. denied*, 270 U.S. 652 (1926); *In re Morgan's Estate*, 72 A. 498, 499 (Pa. 1909) ("Spendthrift trusts can have no other justification than is to be found in considerations affecting the donor alone.") Some bankruptcy commentators have criticized the Code's sanctioning of spendthrift trusts, however, and the Bankruptcy Commission's draft bill had recommended that they be effective "only to the extent of the income reasonably necessary for the support of the debtor and his dependents." H.R. Doc. No. 137, *supra* note 22, pt. 1, at 193, 197-98; *see id.*, pt. 2, at 148, 151; Countryman, *The Use of State Law*, *supra* note 22, at 448 n.256; William T. Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 N.C. L. REV. 769, 770, 777-78, 804 (1980); *cf.* Elizabeth Warren, *Reducing Bankruptcy Protection for Consumers: A Response*, 72 GEO. L.J. 1333, 1335 n.17 (1984) (minimizing the practical significance of the issue).

224. *In re Wax*, 147 B.R. 205 (Bankr. D.S.D. 1992); *see supra* note 206 and accompanying text.

225. *E.g.*, *Tillinghast v. Bradford*, 5 R.I. 205, 212 (1858) ("Certainly no man should have an estate to live on, but not an estate to pay his debts with. Certainly property available for the purpose of pleasure or profit should also be amenable to the demands of justice."). Noting the policy distinction between solvency conditions and spendthrift trusts, *see* BOGERT & BOGERT, *supra* note 24, § 222, at 388-89.

226. How did this asymmetry come to pass, as a matter of statutory pathology? The provision invalidating solvency or bankruptcy conditions first appeared in the draft bill prepared by the bankruptcy commission. That bill also *limited* the effectiveness of spendthrift trusts in bankruptcy, and so the two provisions were seen as *complementary*. H.R. Doc. No. 137, *supra* note 22, pt. 2, at 147-48; *Plumb*, *supra* note 22, at 90-92. But when the

At any rate, the fundamental point to be made here is a simple one: Even ignoring the Code's incongruous treatment of insolvency conditions, the existing six-month window runs counter to a cardinal principle of inheritance policy. On that account alone, the rule is of doubtful public utility.

### Conclusion

As I have sat in my office lo these many evenings reflecting on these ideas, I have sometimes wondered whether I heard the ghost of Anatole France laughing at me. "The law, in its majestic equality, should permit children of the poor as well as the rich to scramble into bankruptcy and then inherit a fortune," might be his mocking refrain.<sup>227</sup> Forgive the legislative moles their congenital blindness, put aside all the pretentious theorizing; when one steps back and examines matters at an intuitive level, there still seems to be something invincibly disturbing about permitting debtors to do as I have advocated here. In the course of assessing rights to exempt property in bankruptcy, the drafters of the Code remarked that "the policy of the bankruptcy law is to provide a fresh start, but not instant affluence" to the debtor.<sup>228</sup> Were Section 541(a)(5) repealed, debtor-beneficiaries would indeed emerge from bankruptcy poised to enjoy "instant affluence." This same spectre may also have hovered over Professor MacLachlan sixty years ago, when he justified denial of expectancies to the discharged debtor, *inter alia*, on the ground that expectancies bore "no relation to his normal budget" and could result in his "coming into great wealth during the administration of bankruptcy."<sup>229</sup> If nothing else, decorum demands that the discharged debtor scrape a living for a while.<sup>230</sup>

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limitation on spendthrift trusts was later dropped from the final version of § 541, the drafters apparently forgot to revise the treatment of solvency conditions, standing right alongside it!

227. Cf. ANATOLE FRANCE, *LE LYS ROUGE* 118 (1894) ("The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.")

228. BANKRUPTCY REFORM ACT OF 1978, S. REP. NO. 989, 95th Cong., 2d Sess. 6 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5792.

229. See *supra* note 71 and accompanying text; see also Note and Comment, *supra* note 61, at 918.

230. A recent court applauded the six-month window on this basis: "A debtor could, prior to the addition of these sections, . . . come into great wealth during the administration of his estate. . . ." *In re Hamill*, 317 F. Supp. 909, 912 (D. Kan. 1970); see *In re Hall*, 16 F. Supp. 18, 18 (W.D. Tenn. 1936) (condemning, but not voiding, a bankruptcy petition when the debtor's expectancy was "almost immediately realizable"); *Bank of Elberton v. Swift*

I would submit that the unseemliness of this scenario is an illusion that dissolves on closer inspection. The institution of inheritance, for better and for worse, often prompts a quantum shift in the assets of the beneficiary. If we wish to derive the benefits of the institution, such as they are, we must import inheritance policies into the fresh start. And to the extent this leaves some debtors better off than others, well, the discharge has never truly functioned as a leveler. By virtue of disparate human capital, if nothing else, some debtors always have a head start over others. Nor, ultimately, should this disparity be theoretically troubling: The whole point of the discharge is to encourage persons to take advantage of the opportunities that chance and circumstance present to them.<sup>231</sup> And so, when Gordon Johncock prudently declares bankruptcy a month before racing in (and winning) the Indy 500,<sup>232</sup> he is doing precisely what we want him to do—namely, taking advantage of the discharge to free up an opportunity that he would otherwise have had little incentive to seize.<sup>233</sup> In the context of family wealth transfers, those opportunities are certain to vary widely, yet this variance is but an exaggerated form of the dispar-

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(*In re Swift*), 268 F. 305, 307 (5th Cir. 1920) (similarly condemning a petition when expectancy "followed so closely in time upon the filing of the petition"). In a similar vein, courts have looked askance at lottery winners in bankruptcy. *Brown v. Boyn* (*In re Brown*), 86 B.R. 944, 947-48 (N.D. Ind. 1988) ("The message to the [debtor] is clear: You won big in the Arizona lottery. You lose here!"); see *In re Koonce*, 54 B.R. 643, 644 (Bankr. D.S.C. 1985) (holding that receipt of a lottery prize warrants modification of a Chapter 13 plan); *In re Cook*, 148 B.R. 273, 277-81 (Bankr. W.D. Mich. 1992) (same, Chapter 12 plan); *In re Miller*, 16 B.R. 790, 791 (Bankr. D. Md. 1982) (holding that lottery winnings become property of the estate upon filing a Chapter 7 petition); *In re Meyers*, 139 B.R. 858, 861-62 (Bankr. N.D. Ohio 1992) (same). For an early English discussion, see *Tudway v. Bourne*, 96 Eng. Rep. 1231, 1232, *aff'd*, 97 Eng. Rep. 529 (K.B. 1759) (*dicta*).

231. Compare exemption law, which has been criticized for "tend[ing] to perpetuate our economic class structure." Vukowich, *supra* note 223, at 770-71. But see STANLEY & GIRTH, *supra* note 36, at 206 (suggesting that exemption law should help the debtor to "maintain a standard of living reasonably consistent with his occupation and previous history").

232. N.Y. TIMES, Aug. 16, 1973, at 48. The jurisprudential significance of the race was overshadowed by its human tragedy. Johncock left behind him a grisly trail: one dead crewman, two drivers critically burned, and thirteen hospitalized spectators. Johncock himself was reportedly "subdued in victory." Robert F. Jones, *Indy's Somber Trial by Fire and Rain*, SPORTS ILLUSTRATED, June 11, 1973, at 30, 33.

233. But see *supra* text accompanying note 183. It may be noted here that the endeavor to "strike it rich" is as much a part of the American grain as is the endeavor to persevere through hard and extended effort. Notice, for example, how the heroes in Horatio Alger novels always labor assiduously but usually owe their success not to those efforts, but rather to some lucky stroke. See JOHN TEBBEL, FROM RAGS TO RICHES 14, 17, 204 (1963). There would seem no reason under discharge theory to distinguish the two endeavors.

ities of opportunity that also await discharged debtors in the context of commercial employment.

That legislative drafters in MacLachlan's day as well as ours ultimately recognized all of this, despite ritual protestations about bankruptcy abuse, is again suggested by their decision to limit the six-month window to testamentary transfers, both under the Chandler Act and the modern Code. Section 541(a)(5) does not apply to *inter vivos* gifts,<sup>234</sup> and the benefactor remains free to shower gratuitous riches upon the debtor the moment she descends the courthouse steps, discharge in hand. However noxious the odor of such a case, the fact remains that parents are not responsible for the debts of their children,<sup>235</sup> and creditors have naught to gain from laws requiring persons who enter bankruptcy to live in poverty for a spell. Effectively barring (by threatening to confiscate) discretionary transfers to discharged debtors would be to give cosmetic considerations undue weight.<sup>236</sup>

Yet this scenario reveals another dimension to the problem at hand, one suggesting that the present treatment of expectancies under the Bankruptcy Code is not only unhelpfully decorous, but affirmatively perverse. For while the six-month window appears at first sight to curtail legal manipulations by the wealthy, in practice it almost certainly has the opposite effect. As a consequence, it will function to discriminate against *poorer* families.<sup>237</sup> By excepting gifts from its

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234. See *supra* note 23.

235. See *Re Baker*, 63 C.B.R. (new ser.) 21, 23 (Ont. 1987) (citing this lack of obligation as a justification for declining to suspend the discharge of a debtor with a prospect of inheritance); see also *infra* note 238.

236. This is not to say that cosmetic considerations are weightless. To the extent that lay persons perceive the discharge to operate unfairly—in contravention of social norms—the law may be thrown into disrepute. See William T. Vukowich, *Reforming the Bankruptcy Reform Act of 1978: An Alternative Approach*, 71 GEO. L.J. 1129, 1132 (1983). There does in fact appear to be a popular perception that bankruptcy is frequently abused by the well-to-do. See DAVID R. EARL, *THE BANKRUPTIANS* 21-22 (1966); *A Rush to Personal Bankruptcy*, NEWSWEEK, Aug. 11, 1980, at 59; Jonathan Foreman, *The Freedom to Fail*, AUDACITY, Winter 1994, at 28, 28; Teresa Sullivan et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091, 1136 n.283; Bill Surface, *Planned Bankruptcy: The Racket that Cheats Us All*, READER'S DIG., May 1966, at 125; Susan D. Kovac, *Judgment Proof Debtors in Bankruptcy*, 65 AM. BANKR. L.J. 675, 675-76 & n.5 (1991). It is questionable, however, whether this perception extends to holders of expectancies, and whether it is sufficiently widespread and pronounced to disturb public confidence in the integrity of the bankruptcy system.

237. Readers of a critical bent might be tempted to surmise that this result is precisely what the drafters intended and that the prevailing rule, coming in the guise of a uniform prescription, is an example of brilliantly disguised retrogressivity. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 253-66 (1977). I re-



purview, Section 541(a)(5) offers the well-heeled a simple expedient whereby they can provide for a discharged beneficiary. In the natural order of things, they can far more easily afford to part with property during their lifetimes than can the less fortunate. But even absent this exception, a knowledgeable benefactor would have small difficulty evading the six-month window. Through estate planning gimmicks like the spendthrift trust, he could accomplish even a *testamentary* transfer to his intended beneficiary without triggering this provision of the Code.<sup>238</sup> As it stands, then, Section 541(a)(5) has no other effect than to set traps for the unwary—it preys upon ignorance and inadvertence—and, as always, it is the poorer, less well-advised benefactor who is more likely to get caught with his legal guard down. Time and again, commentators have cautioned against the enactment of rules that discriminate against the unsophisticated,<sup>239</sup> and courts have often expressed sympathy for this jurisprudential principle, on occasion even relaxing rules that conflict with it.<sup>240</sup> The six-month window, on

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main skeptical of such a sinister interpretation. It seems to me far more plausible that § 541(a)(5) is a product of analytical oversight, or rather shortsightedness, as explained hereinafter. Certainly, there is nothing to be found in the documentary record, including Professor MacLachlan's private, unpublished papers, to suggest otherwise. See MacLachlan Papers, *supra* note 30.

238. See *supra* note 222. That testators could estate-plan around the six-month window was noted by several early critics. Gage, *supra* note 151, at 400-01; Walker, *supra* note 214, at 44. For examples of such estate planning by wealthy testators to protect beneficiaries in bankruptcy, see *Beals v. Croughwell*, 299 N.W. 638 (Neb. 1941); *Kreiss v. Mann* (*In re Kreiss*), 58 B.R. 999 (E.D.N.Y. 1986); and *Mann v. Kreiss* (*In re Kreiss*), 72 B.R. 933 (Bankr. E.D.N.Y. 1987). In each case, the court rejected creditors' challenges to *benefactors'* actions as fraudulent, on the ground that benefactors are free to dispose of their property as they please. *Beals*, 299 N.W. at 641; *Kreiss*, 72 B.R. at 941. Clever estate planning to thwart creditors of beneficiaries is an old game, predating even the Chandler Act. *E.g.*, *In re Harper*, 155 F. 105 (2d Cir. 1907).

239. In connection with bankruptcy law, see Frank R. Kennedy, *Limitations on Exemptions in Bankruptcy*, 45 IOWA L. REV. 445, 479-81 (1960); Harris, *supra* note 90, at 342; Eisenberg, *A Rejoinder*, *supra* note 90, at 621-22; cf. Eisenberg, *Bankruptcy Law*, *supra* note 89, at 996 (observing that to some extent such discrimination is inevitable under any detailed law). In connection with probate law, see John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 531 (1975); Fellows, *supra* note 211. For general discussions, see Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 22-25 (1992) (criticizing complicated rules); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590-93 (1988) (criticizing the strict application of rules).

240. In connection with bankruptcy see, for example, *Arkison v. Plata* (*In re Plata*), 958 F.2d 918, 922 (9th Cir. 1992); *Dampskibsselskabet AF 1912 v. Black & Geddes, Inc.* (*In re Black & Geddes, Inc.*), 16 B.R. 148, 151 (Bankr. S.D.N.Y. 1981) (federal rules of pleading); *In re B & F Assocs., Inc.*, 55 B.R. 19, 22 (Bankr. D.C. 1985); *Martin v. First Nat'l Bank* (*In re Butcher*), 78 B.R. 520, 523 (Bankr. E.D. Tenn. 1986); *In re Owens*, 67 B.R. 418, 422 (Bankr. E.D. Pa. 1986) (motion practice); *In re Copeland*, 391 F. Supp. 134, 151 (D. Del. 1975) (Uniform Commercial Code); *Liberty Loan Corp. v. Wallace* (*In re Wilson*), 390 F.

the other hand, has been scrupulously enforced.

That legislators and judges by and large have failed to grasp this rule's substantive demerits as well as its capriciousness may not, at the end of the day, be so surprising. Their shortsightedness can once again be traced to tunnel vision, though operating within somewhat broader confines than that already described.<sup>241</sup> It happens that the six-month window appears within a *bankruptcy* code, administered by *bankruptcy courts*. Its drafters, Messrs. Weinstein, MacLachlan, and other participants in the National Bankruptcy Conference, treated of their subject as *bankruptcy experts*.<sup>242</sup> The Code reflects this doctrinal focus. Its flaws become clearly apparent only when it is read in the light of *inheritance* policies.<sup>243</sup> That those policies received shorter shrift than they merited stemmed from the (categorically arbitrary) decision to assign this borderline problem to one set of specialists, instead of the other.<sup>244</sup> Had the issue arisen under a probate code, to be applied by probate courts, it almost certainly would have been handled differently.

Though the insular nature of the Bankruptcy Code has been criticized before,<sup>245</sup> the problem remarked here is hardly unique to this particular area of law. Once we have taken the structural step of partitioning the legal landscape into discrete categories, lawmakers immersed in any one area are unlikely to pay adequate regard to the

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Supp. 1121, 1122 (D. Kan. 1975); *Tejas Drilling Co. v. Del Int'l, Inc.* (*In re Tejas Drilling Co.*), 849 F.2d 176, 179 (5th Cir. 1988) (vendors' liens); *Feldman v. Trans-East Air, Inc.*, 497 F.2d 352, 355-56 (2d Cir. 1974); *In re Car-Gill, Inc.*, 125 B.R. 133, 136-37 (Bankr. E.D. Pa. 1991); *In re Picculi*, 145 B.R. 777, 778-79 (Bankr. W.D.N.Y. 1992).

241. See *supra* text accompanying note 226.

242. See *supra* note 32. MacLachlan may have been the most versatile of the drafters, having taught a wide range of courses at the Harvard Law School, including basic property. *James Angell MacLachlan*, *supra* note 70, at 3.

243. See *supra* notes 108-121, 197-211 and accompanying text.

244. The problem of categorical overlap is, of course, an ancient one, and it spawned an ancient solution: acknowledgment of the "mixed" action. As Professor Maitland (no friend of the writ system) added playfully: "Mixed" is a blessed word. The impatient student who looks down upon medieval law from the sublime heights of 'general jurisprudence' will say that most of our English actions are mixed and many of them very mixed." 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 572 (S.F.C. Milsom ed., Cambridge Univ. Press, 2d ed. 1968) (1895).

245. "[T]he problem is the way in which bankruptcy law is perceived as an area separate from the rest of the legal world. In many respects the new bankruptcy [code] inadequately reflects bankruptcy law's existence as part of a legal structure that includes many other . . . laws . . ." Eisenberg, *Bankruptcy Law*, *supra* note 89, at 953; making the same point, see JACKSON, *supra* note 25, at 279. For a discussion of the problem from the perspective of the insular practitioner, see Adler, *supra* note 7. I have further harped on the problems of legal categorization in Hirsch, *supra* note 25, at 652-54.

policies prevalent within others. Of course, it is easy enough to admonish them to do so—but more difficult, bureaucratically, to ensure that they will. Legal categorization is so useful; it is a pity that it is also so troublesome.

In any event, analysis of the problem at hand from the perspective of testamentary intent should at least steel us to the disembodied musings of Anatole France. I bid him to go off and haunt the drafters of inheritance tax legislation before he torments the novice bankruptcy commentator.